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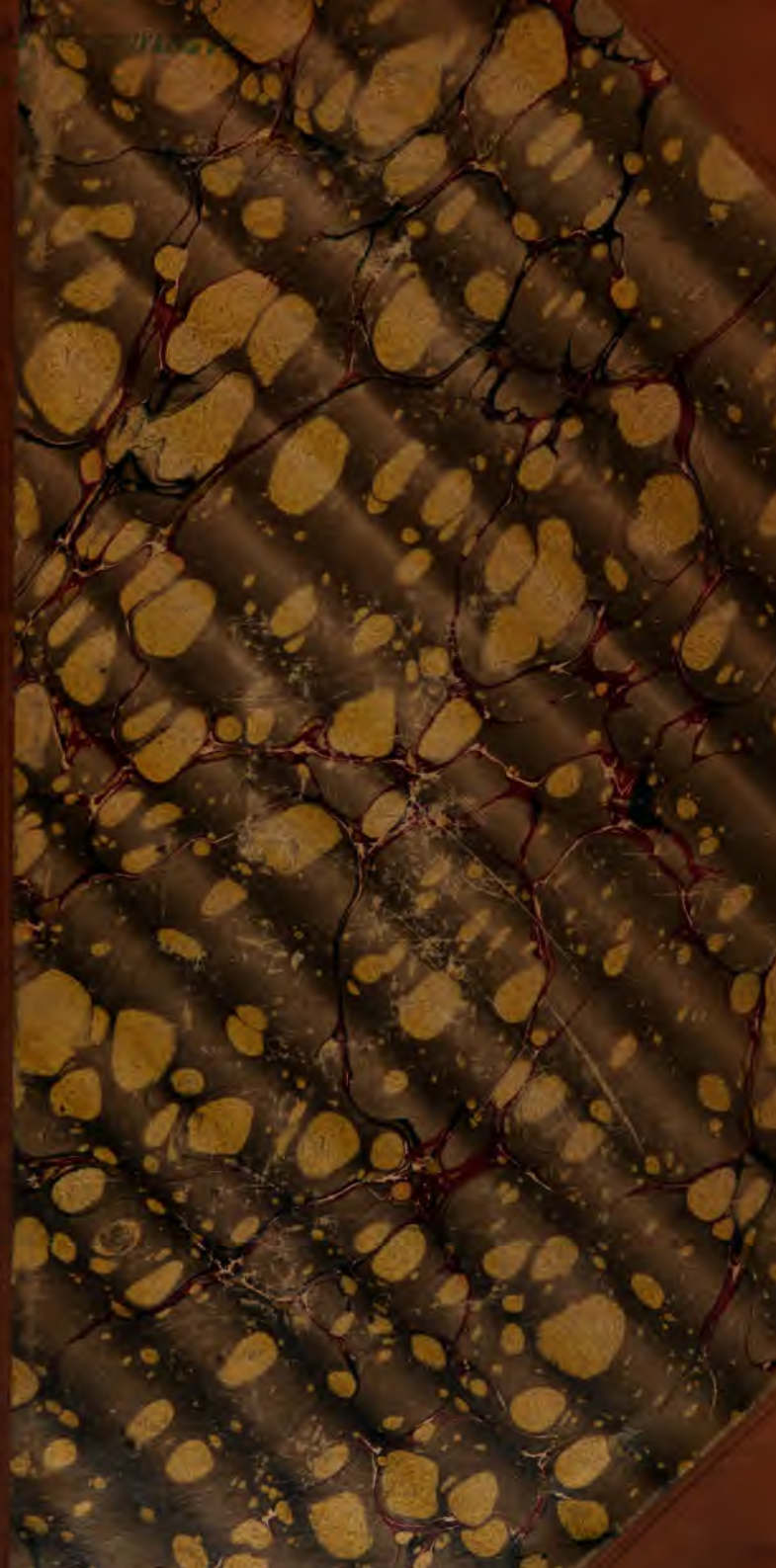
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THE
LAW MAGAZINE;

OR

QUARTERLY REVIEW

OF

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THE LAW MAGAZINE.

ART. I.—UNPAID JUSTICES OF THE PEACE.

1. *Observations upon the Institution of unpaid Justices of the Peace.* London. 1829.
2. *A Return of the Number of Persons committed to Prison on Summary Convictions in England and Wales, in the year ending Michaelmas 1835, by one or more Justices of the Peace acting out of Quarter Sessions.* Ordered by the House of Commons to be printed August, 1836.

THE institution of Justices of the Peace has been frequently a subject of discussion, in parliament, in reviews, and in pamphlets. Besides the numerous legislative enactments relating to the duties of the office, the beneficial operation of the institution itself, as an unpaid body of magistrates, has been brought into question, but always, we think, regarded in a point of view much too narrow. That some amendments are wanted in the constitution and jurisdiction of that body we are persuaded, but are equally persuaded that none are required which strike at its principle—the administration of the law by unpaid magistrates.

A more extensive power of appeal from their decisions, and security for the appointment of honourable and independent men, and the rejection of all others, must be the bases of whatever improvement can be made; and, upon those bases, very slight alterations may be productive of great improvement. To change the principle of the original institution as a body receiving no stipend, would produce effects probably beside the intentions of any friend to such a measure, and certainly beyond his capacity to foresee.

In all governments, and perhaps in exact proportion to their civilization, every institution of importance operates not only directly upon the immediate subjects of its intended action, but extends far through the texture of society with an indirect and collateral influence, beyond the power of observation to follow to its extreme limits; nor can any just judgment be formed as to the wisdom of disturbing a long-established institution, by limiting our examination to its direct effects, by discarding all estimation of its remote and collateral tendencies, of its relative position to other existing establishments.

Objections very powerful in theory to a new system about to be introduced, which has not yet interwoven itself with manners, habits, ranks, and the complicated relations of social life, lose their weight with respect to the same system when it has been long in operation, and become mixed with and modified in its practice by other establishments, which receive and convey an influence of reciprocal operation. The trial by jury in *civil* causes is an illustration of this truth; for however questionable it may be, and questionable no doubt it is, whether a jury is not a defective tribunal for the decision of civil causes, considered in itself, yet no one can doubt that the position it holds in relation to the judge and the advocate, improves them both as instruments for the administration of justice, mitigating the discretion of the one, and enlarging the freedom of the other, so as to create by the union of the three a noble judicature, worthy of a free and civilized people.

Thus, though in theory it may appear that the functions exercised by the justices of peace require a more peculiar application to the knowledge of law, than far the greater number can be supposed to give; yet, after a due regard to the general result of their proceedings—to the antiquity of the institution, and therefore its close connection with other branches of our jurisprudence, as well as with the usages of the people—to the number of persons required to render the system efficient—to the gratuitous nature of their services, infinitely more valuable from its moral influence upon themselves and others, than from the saving it causes in the national expenditure—to the necessity, if these services are transferred to other hands, of establishing a body of paid officers dependent upon the crown for their performance—it will be found that any

violent disturbance of the foundation of the system would be attended with the greatest practical inconvenience.

To warrant organic changes in an ancient institution, it is not enough to show the existence of theoretic anomalies, nor even of some practical evils; but probable assurance should be given that the proposed change will not only remove those evils, but will come unaccompanied with a more pernicious train. With politicians who would change the forms in which practical benefits are administered, because they want those rounded proportions so delightful to the fancy of a thorough doctrinaire, it is in vain to argue; but those who aim only at useful results, and yet measure their objects by a standard of imaginary perfection, should remember, that, life being a choice of evils, to attempt the creation of a system freed from that abiding and essential ingredient, imperfection, is to encounter the certainty of failure.

A very short sketch of the origin, nature, and extent of the judicial powers of this institution, will show how important a part it forms of our civil establishments, and therefore how little fitted to admit of violent alteration.

The constitution of justices of the peace is founded upon that of conservators of the peace, which existed by common law.¹ The conservators of the peace consisted as well of persons who were such in virtue of particular offices, as of others claiming the power by prescription, or obliged to exercise it by tenure of lands, or such as were elected in the county court before the sheriff "*de probioribus et potentioribus comitatus sui in custodes pacis.*" But the power of these officers, compared with that of the more modern justices of peace first created in the reign of Edward the Third, was extremely limited; it extended to the committing to prison all those who broke the peace, or binding them by recognizance to keep it; their jurisdiction as to felonies, and the judicial powers they now possess, were given them by various statutes in the reign of that king, when they acquired their present appellation of justices.

The occasion upon which the people lost the right of electing conservators of the peace was upon the deposition of

¹ 1 Black. 349.

Edward the Second by his queen, and the substitution of his son, mentioned as follows by Blackstone :--“ To prevent “ therefore any risings or other disturbance of the peace, the “ new king sent writs to all the sheriffs in England, the form “ of which is preserved by Thomas Walsingham, giving a “ plausible account of his manner of obtaining the crown ; to “ wit, that it was done *ipsius patris bene placito* ; and withal “ commanding each sheriff that the peace be kept throughout “ his bailiwick, on pain and peril of disinherittance and loss of “ life and limb. And in a few weeks after the date of these “ writs, it was ordained in parliament, that for the better main- “ taining and keeping the peace in every county, good men “ and lawful, which were no maintainers of evil, or barretors “ in the country, should be assigned to keep the peace. And “ in this manner and on this occasion was the election of the “ conservators of the peace taken from the people, and given “ to the king ; this assignment being construed to be by the “ king’s commission. But still they were only called con- “ servators, wardens, or keepers of the peace, till the stat. “ 34 Edward III. c. 1, gave them the power of trying felonies, “ and then they acquired the more honourable appellation of “ justices.”¹

How far it might be desirable at that period of our history, that a body invested with the limited powers then intrusted to the conservators, should be elected by the voice of the people, is not within the scope of this inquiry ; it was not irrational that those who chose the knights of the shire to represent their interests in parliament, should be entrusted with the choice of officers who, in a political point of view, were of no comparative importance ; but it is clear that unless the choice of these conservators had been shifted from the people to the crown, they never could have been converted into the modern justices of peace, without a violation of the first principles of security for the impartial administration of law, an appointment to judicial functions independent of popular canvass.

It is not our intention to discuss the vast variety of duties cast by the legislature upon this body ; their extent is witnessed by the four thick volumes of Burn, omitting the law

¹ 1 Black. 350.

relative to the poor; but rather to call the reader's attention to a few of the most leading and important.

Perhaps there is no duty a justice of the peace is called upon to execute which displays more strongly the importance and utility of the body as a numerous one, than the cognizance of the primary charge against suspected offenders. The legal course of criminal prosecution, is either to convey the accused with or without a written warrant before a magistrate to be committed or bailed for trial, or discharged: or else to prefer a bill of indictment at the next quarter sessions or assizes, and if the bill is returned a true bill, to apprehend the offender upon a bench warrant. The first mode of proceeding, however, is the one usually adopted, particularly in felonies, as the latter obviously leaves the supposed criminal every opportunity of escape which time can furnish. Here therefore is a duty of the most important kind both to the public and the accused, which every justice may be daily called upon to execute. Let the following comparison of the numbers of persons committed, tried, and convicted, show the manner of its execution.

By the tables made from a return to the House of Commons for the year 1835, the number of offenders committed for trial during that year amounted to 20,731, of which more than two-thirds, viz. 14,729, were convicted, 4059 were acquitted, and of the remaining 1943, they were either not prosecuted or the grand jury threw out the bills.—Thus more than two-thirds of those committed were found guilty of the charge preferred against them, and nearly seven-eighths were put upon their trials by the grand jury; this result is sufficient to remove from the body of committing magistrates the imputation of exercising the function indiscreetly or oppressively. For let us see what is the duty of a justice of peace upon the apprehension of a suspected person. “The justice before whom such prisoner is brought is bound immediately to examine the circumstances of the crime alleged.”—“If upon this inquiry it manifestly appears either that no such crime was committed, or that the *suspicion* entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.”—Blacks. iv. 296. Thus

it is only where suspicion is wholly groundless that the magistrate is justified in discharging the accused. Now of the above number committed upon suspicion nearly seven-eighths would have been certainly apprehended upon the finding of the grand jury, and when from the remaining eighth are taken those who were discharged for want of prosecution, there will remain only a small portion against whom the bills of indictment were thrown out; as to which number, one may readily conceive many circumstances might occur between the commitment and the sitting of the grand inquest, to prevent the attendance of all the necessary witnesses. And with respect to those few cases, in which it may be supposed that upon precisely the same evidence the grand jury and the magistrate came to a different conclusion, it should be remembered that the same degree of suspicion which justifies a magistrate in committing for trial or holding to bail, will hardly warrant a grand jury in finding a bill of indictment, otherwise there would be little use for the intervention of that inquest.

Judging therefore by the above test of the mode in which this duty is performed, it is not easy to suggest a system more favourable to a just administration of this part of our law, certainly not to a more convenient one.

Paid officers in the appointment of the crown, approaching towards the number of the present justices, would be objectionable in a twofold view, both as to the expense, and to the increased influence their nomination would confer upon the minister of the day; and any great reduction of the number of functionaries would so much increase the burden of instituting prosecutions, as to operate directly to the encouragement of offences. For suppose this function were intrusted to one, two, three, or some few more paid officers in each county, how much would the burden and expense of prosecutions be increased by the necessity of conveying the accused to a distance from the place of apprehension, for the purpose of this primary inquiry? In the year 1826 more than 16,000 prisoners* in England and Wales were committed to take their trials, omitting those who were bailed; suppose a justice to reside within every

* Seventh Report of the Prison Discipline Society.

circuit of ten miles : each of those prisoners must have been conveyed, upon an average, five miles to the justice to be charged, and thence to the county gaol. Instead of five miles let the average be twenty, and the inconvenience of commencing prosecutions would be so great, as to diminish at least half the number. The sense both of public justice and private injury has its limits, and great personal inconvenience will extinguish the zeal of either.

Important as this duty of commitment for trial is, the judicial functions of the justices in *sessions* are not less so ; the number and quality of the offences which four times a year are submitted to their final determination, nearly as numerous though not of such deep criminality as those which are tried by the judges of the superior courts, renders it most essential to the liberty and security of the subject, that none but honourable and worthy persons should be in the commission. There is no punishment save that of death which they may not inflict in common with the judges of the land, and even this sentence it is within their jurisdiction to pronounce, were they to exercise the power of trying capital offences vested in them by their commission. But from this they invariably forbear. Although, therefore, the nice distinctions which arise upon the legal construction of most actions where guilt is made liable to the penalty of death, are removed from the consideration of this tribunal, it is obvious that in offences against property, the value of the property stolen in no degree affects the legal quality of theft, and the definition of larceny requires as strict and nice an application in a doubtful case where sixpennyworth of hay is in question, as where goods of great price are the subject. Moreover, there are many misdemeanors disposed of at the quarter sessions, the consideration of which frequently requires a familiarity with legal views, and a power of discerning the slightest shades of difference.

To discriminate the legal quality of the offence: to judge of the technical form of the indictment: to decide upon the various questions relating to the admissibility of evidence which arise in the course of almost every trial where the prisoner is defended by counsel: to sum up the evidence to the jury with impartiality and clearness, and give them some

comprehension how the law is applicable to the particular case: all of which the subject has a right to require shall be performed with ability and integrity: and afterwards to exercise that most fearful of human powers, which is the sanction of all laws, the infliction of punishment proportionate to the crime: would seem to require the security of a particular education, much legal learning, much practical experience, and above all, immediate responsibility. And yet without a particular education, without legal learning as to far the greater number, with no more experience than what about twelve days in the course of the year at divided intervals can confer, and with scarcely any *practical* responsibility, the county magistrates exercise these functions, and with advantage to the public. Whence is this apparent anomaly? It arises from various causes.—In almost every county there are some members of the Bench who either have been educated to the profession of the law, or else possessing talents and inclination for business, have industriously acquired a competent knowledge of that branch of it, which is applicable to this duty, and which lies in no extensive compass; the influence of such men gives imperceptibly a direction to the whole Bench. The presence also of practising lawyers affords a means of acquiring immediate information upon new or complicated questions. But above all, the love of justice, which ought to govern the conduct of all gentlemen, and does govern that of the greater part who assemble at the sessions, strengthens the capacity for administering it, by exciting attention to the facts of each case, and the reasoning of others upon them. To this may be added a truth, for which, if authority is wanted, it may be found in the various observations of Lord Bacon, that human affairs, the practicks of life, are of a coarse texture, too much refinement is unfitted to deal with them, and impedes their progress: plain understandings, which look at the subject before them in a direct view, arrive at just conclusions by regarding only the strong and prominent points; and therefore though sometimes a technical impediment is overlooked, or an unfounded objection allowed, it may be doubted whether an innocent person is not as little likely to suffer from an unsupported charge at the quarter sessions, as before the higher tribunals; sub-

stantially the proceedings are as just, though technically less perfect.

These judicial duties may be divided into two parts, the trial of the fact, and the sentence after conviction.

It has been supposed that no remedies exist for the correction of error in the decision of legal questions during the trial. This is a mistake; precisely the same remedies exist as in all other courts of justice, a writ of error to be brought by the prisoner or defendant, as to matters on the record, and a reservation of the points of law at the option of the bench for better consideration, according to the following express direction in their commission. "Provided always, that if a case of difficulty upon the determination of any of the premises before you or any two or more of you shall happen to arise; then let judgment in no wise be given thereon before you or any two or more of you *unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assizes in the aforesaid county.*"

These remedies indeed, though provided, are rarely or never resorted to, and one of our proposed amendments is, that the latter, which is far the more ready, should be made compulsory upon the justices, instead of being left, as it is in practice, altogether discretionary.

As to the first, it is obvious that a man convicted at the sessions of a petty felony, is not likely to find funds to carry on the process, and if he could, in the accumulation of business in the King's Bench, his many months of imprisonment, diversified by the tread mill, and solitary cell, would probably all be undergone before the legality of the sentence were decided. But the other: the suspension of the judgment till the point of law can be submitted to one of the judges of the land, a measure expressly required of the justices in the commission under which they act, is of easy adoption, and whenever the assizes follow close upon the sessions, or the offence requires either transportation, or imprisonment beyond the intervening time, might be as efficacious as the reservation of similar questions by the judges of our superior courts. It is rare indeed that a doubtful question of criminal law is decided ultimately by a single judge, perhaps too rarely, as superior

learning will sometimes magnify difficulties, and create imaginary distinctions ; at the same time it is impossible to blame even an excess of caution in this respect, so important an object is uniformity in the legal decisions of those whose decisions are the law. Is it therefore calling upon the justices of peace for too much attention to their duties, for too much respect for the laws by which their own property is protected from spoliation, by which the liberties of men are disposed of, to require them to obey this provision in their commission, and follow the example of the judges in an instance where a good example is easily followed ?

It would not however be expedient that doubtful questions of every description should be invariably reserved. Technical objections to the allegations in the indictment, if not very clear and intelligible to persons tolerably competent to consider them, may well be overruled with very little violation to the forms of justice, and none to the substance ; the offence itself is neither altered nor refuted by a suspected flaw in the charge, besides which an acquittal upon a defective indictment is no bar to a future prosecution. The reservation of such objections therefore is not to be encouraged. In this respect the relative situation of the judges and justices of peace is very different. It behoves the former, who are the expounders of the law, and whose exposition is the law, to be as accurate in the determination of technical forms, as of substantial distinctions, and to deduce the first as strictly from the principles on which their rules are founded, as the latter ; because in a mere abstract point of view it is important that their decisions should be in every description of case exempt from error, as far as human nature can be exempt ; they should be right, for the mere sake of being right. Moreover, if forms were not strictly canvassed in the superior courts, if they were not preserved there as in a safe repository, they would soon vary and melt away, till at last the original standard would be lost, and the substance of justice endangered.

A looser adherence to technical forms in the exercise of judicial functions may be endured from justices of the peace ; their duties will be satisfactorily discharged if guilt rarely

escapes detection, and innocence is free from danger. Precedents are not drawn from the quarter sessions.

But decisions upon the *quality* of offences are of a different character; a wrong decision there, is an imputation upon the justice of the country; a party charged with a fact as if it were a crime, which is not strictly within the definition of the crime, is as free from legal guilt, and consequently as justly exempt from punishment, as if the fact were not made out in evidence; wherever therefore the least doubt occurs in the breasts of the justices of the peace upon the nature of the crime, it is their duty to resort to the only means of resolving it; and the invariable neglect of this means diminishes both the value and respect of their tribunal. If the public knew that all doubtful points, or those supposed to be doubtful, were reserved for a higher decision, a greater confidence must necessarily be established in the general proceedings of the court, for its unassisted determination upon such questions is obviously made at hazard. A reference of their doubts to the better knowledge of the judges, which now stands an unregarded proviso in the commission, a useless incumbrance of empty words, like the charge "to try all manner of sorcery and witchcraft," which still ludicrously enough occupies its ancient position there, should be made compulsory. If justices of peace were *obliged* upon the motion of a counsel to refer a copy of the indictment and evidence in all cases required, to the judges at the next assizes, such copy to be signed by the counsel as a guarantee against frivolous reservations, and to be decided by the judges during the assizes, either with or without argument, the law would be better administered. A counsel, for his own reputation, would not sign a case which was free from doubt, or at least the evil of many such occasional occurrences would be less than the evil of one illegal conviction. But it might occupy a longer time than is at present afforded for the duration of the assizes; it might, if such references were frequent; but whilst political society imposes penalties for crimes, it is bound to furnish time for the defence of the criminal.

It is singular that this species of reference in criminal cases is never made in modern times, since in questions relating to the settlement of paupers where the same option exists of

resolving doubtful points by stating a case for the consideration of the Court of King's Bench, it was, before the late Poor Law Bill disposed of that subject of litigation, of very frequent occurrence. Judging, indeed, by the size of the volumes which contain the decisions of such questions, the modesty and love of justice of the magistrates appear in the most favourable point of view. And in regarding this extraneous bulk of English law, which governed the settlement of the poor, one cannot but be struck with two different impressions, one of admiration at the great diligence and subtle application of principles, employed in reconciling statutes made at different times, not under the wisest views, and often imperfectly worded; the other, of regret that so much subtlety was wasted in the creating of shadowy distinctions, upon a body of laws very little connected with any rules of natural equity.

With respect to the sentence after conviction, it has been thought, and with truth, that the justices are apt to award a more severe punishment than the offence fairly warrants. This at the first impression is unaccountable, for it should seem that a body of English gentlemen, whose feelings generally lean to the side of humanity, who are not bred, practised, and hardened in the routine of judicial proceedings, where the moral is sometimes absorbed in the professional view, that the fate of a prisoner may awaken less interest than the point of law on which his life depends;—who approach to decide on the liberties of men, not with an indifference acquired in the conflicts of the bar, nor with the dispassionate abstraction which judicial habits should create, but from the bosom of leisure, or from employments foreign to such responsibility,—would act under impressions somewhat analogous to those of spectators, whose judgments are less active to perceive the necessity of punishment, than their feelings to sympathise with the convict. But this very rareness of reflecting upon legal consequences, of comparing the degrees of offences as they are disclosed in courts of criminal judicature, is one of the causes of this defect; it leaves them without an accurate measure to regulate the punishments they pronounce, and as there is no natural proportion, except exact retaliation, betwixt any crime and its punishment, they are either governed by some association which ought not to affect

the course of justice, or left to vacillate without a measure between the smallest and the highest penalty of the statute. Sometimes, perhaps, it is whispered that the offender is a veteran poacher, and therefore no subject for a *mitigated* sentence; the exaggerated susceptibility of country gentlemen upon all matters relating to the preservation of game, seems an uneradicable taint descending from our feudal forefathers. But whatsoever of evil may be traced to this source, is not attributable to the institution we are regarding, but to a system of laws not only irrational in themselves but in their operation a snare to the morals of the people, and a stumbling-block to the due administration of justice.

For this over-activity in attempting to repress crime by the severity of punishment, the success of which is doubtful, there is no remedy to be found in the direct controul of another tribunal. Perhaps an obligation to present to the judges at the assizes a written or printed statement, more full than the general calendar, of every offence tried at the two preceding quarter sessions, with the punishment pronounced upon each, might operate as an indirect controul, and induce a desire of assimilating their sentences to those of the judges.

But their judicial duties are not all exercised in an open court, where many are present to aid and controul each other, subject to the observation of the public, to the attendance and therefore the check of the Bar; there is a power conferred upon two justices, in some cases upon one, of convicting summarily in presence only of the parties concerned, without the intervention of a jury, offenders against the game laws, offenders in petty trespasses; and by the late statutes, offenders in matters where the crime has all the qualities of theft, which must therefore be accurately distinguished by the convicting magistrate, or the defendant receives injustice. From most of these convictions an appeal lies to the quarter sessions, in many, no farther. Now though summary convictions are useful in many cases, particularly as modified in some instances in the late statutes, which give the justices of peace a wider discretion, in sanctioning a compromise with the complainant; clothing them with a greater power of reconciling disputes, and superseding the necessity of sending those to gaol, whom gaol can never improve; yet the number

of offences subjected to this species of trial is too **extensive**, and the record is not removable by the defendant in *many cases* from the quarter sessions to the King's Bench.

It must never be forgotten that trial by summary conviction is the **exception** and not the rule in English jurisprudence ; it withdraws the subject from his boasted privilege, a trial by his peers : a fundamental principle of English freedom. That a power should be intrusted to a justice of peace, which the law refuses to the Chief Justice of England in his capacity as judge, is an anomaly requiring strong reasons of justification. If it were suggested in the legislature that many petty offences tried at the Old Bailey by a jury, could be much more conveniently disposed of by one of the judges retiring into the sheriff's room and deciding them after the summary manner, whilst his brother judge was proceeding in the ordinary course, it would startle most of those legislators who now unhesitatingly confer this power upon a single justice of peace. There was, indeed, a time in our history when this *discretionary* power was given to the justice of assize as well as of the peace, but the spirit which governed that reign in the exaction of penalties from the subject, is more fertile in examples to be avoided than precedents to be followed. The 11th statute of Henry VII. c. 3, affecting in the preamble to impute corruption to juries, gave authority to justices of *assize*, and of the peace, upon information at their discretion to hear and determine all statutable offences short of felony. This act was a ready instrument in the hands of Empson and Dudley for extracting money from the subject, to be transferred to the royal treasury, and its repeal was amongst the first proceedings of parliament in the succeeding reign.

If, therefore, it is expedient, and we think it is expedient, to create this jurisdiction over some sorts of offences, the limitation should be strictly confined within the civil necessity, and the jurisdiction carefully guarded by all the security that courts of appeal can bestow.

What are the circumstances then under which summary convictions are expedient ? To lay down a principle upon the subject may be difficult ; much more difficult would be the attempt to extract one from the statutes ; they include various sorts of offences ; the pecuniary penalties extend from small

sums up to those of a large amount ; and, in some cases, upon a second conviction the imprisonment is for a year with the addition of personal chastisement. Now the free origin of our establishments warrants the assertion that the trial by jury for *criminal* offences, should never be superseded, except for the ease of the subject. To assemble the freeholders too frequently for the trial of petty offences would be an intolerable burden upon the country ; to commit by a long imprisonment for trial where the offence is trifling, is an oppression upon the individual. When once, therefore, the number of periods most convenient for assembling the freeholders, having consideration both to their public duty and their private occupations, is established, (as for instance in the present usage of four times a year,) the intervals between those periods ought to be the longest measure of punishment which a man should undergo by summary conviction. No offence to which an imprisonment longer than three months is attached, or a pecuniary penalty supposed to be equivalent, should be cognizable except by a jury ; and to such a period, indeed, is the punishment limited by many of these statutes.

These summary proceedings are unknown to the common law ; they are infringements of its principles, infringements in respect of the nature of the tribunal, infringements in respect of its want of publicity : like all penal regulations they are justified only by the necessity, and their necessity is to be measured by the want of a better jurisdiction. But let us observe the opinion of Blackstone : " This change in the administration of justice," (*viz.*, summary proceedings before justices of the peace,) " hath, however, had some mischievous effects ; as, 1. The almost entire disuse and contempt of the court leet, and sheriff's tourn, the king's ancient courts of common law, formerly much revered and respected. 2. The burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission."—" This backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief : which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so ; but the mere tools of office. And then the extensive power

“ of a justice of the peace, which even in the hands of men of
 “ honour is highly formidable, will be prostituted to mean and
 “ scandalous purposes, to the low ends of selfish ambition,
 “ avarice, or personal resentment. And from these ill conse-
 “ quences we may collect the prudent foresight of our ancient
 “ lawgivers, who suffered neither the property nor the punish-
 “ ment of the subject to be determined by the opinion of any
 “ one or two men ; and we may also observe the necessity of
 “ not deviating any farther from our ancient constitution, by
 “ ordaining new penalties to be inflicted upon summary con-
 “ victions.”^a

Similar opinions have been pronounced from the bench by Lord Holt, Lord Mansfield, and other judges, whose legal views will not be holden rash ones, by men who venerate the best parts of our system. From these observations, however, may be excepted convictions upon offences connected with the revenue ; and the reason for this exception in their *favour* applies as strongly *against all convictions* upon offences connected with the *game laws*. The complicated regulations of the revenue arising from the nature and manufacture of the different subjects to which they relate, though easily understood by the dealers in such articles, are extremely difficult of explanation to others ; this together with the strong prejudice of numbers of that class who compose the jury impanelled at the quarter sessions, a prejudice founded upon those contracted views which mistake not only taxation however necessary, but even the protection of fair trading, for political oppression, render it inexpedient that such cases should be submitted to their determination. In the Court of Exchequer, where such trials are generally conducted before special juries, it requires the high character of the judge to infuse into their minds a security that the law is not strained, and his habits of business to distinguish to them all that is relevant, and clear up what is obscure. Whatever may have been the character of that court in times long past, it is impossible to be familiar with it now, and not perceive that any thing rather than partiality in favour of the prosecution is its present complexion.

Considerations of a like nature operate *against* summary

^a 4 Black. 281.

convictions upon the game laws. Though not very complicated, they are far from being clearly expressed ; they are easily susceptible of different constructions, as may be seen from the very different constructions they have received by the magistrates who have convicted, and the court of King's Bench by whom the convictions have been reversed. Add to this the strong feelings of most country gentlemen against all violations of these laws ; the trembling emotion, the morbid apprehensions which agitate their minds and lead captive their understandings when directed to this subject, as though the most precious jewel of aristocracy was linked to this sacred ancient privilege : and an impartial man will readily admit that justice must run imminent danger of shipwreck before a current that sets in with such headlong rapidity.

The best security against this bias, is the intervention of a jury in all prosecutions connected with the game laws.

One further observation upon the subject of summary convictions. It is worthy of great consideration, whether every summary conviction ought not to be removable by certiorari to the Court of King's Bench at the option of the defendant ? The importance of well considering the operation of this jurisdiction is obvious on adverting to the number of convictions in England alone in the year 1835, as set forth in the return prefixed to this article, amounting to more than 30,000. It is clear that this power must, from its extensive action, be either a great blessing or curse to the community ; that the magistracy of England must take the form either of a beneficent or malignant power, dispensing largely of good or evil according to the exercise of the jurisdiction,—whether with purity, knowledge and discretion, or with their opponent qualities. If with the former, one may rejoice that the strifes and anxieties, which must otherwise have rankled for months, are now determined and disposed of as they arise ; that offenders, plunged by accident or temptation into a first offence, are saved from the corrupting influence of prison associations, and the shame of a public arraignment at the assizes or sessions. But if the contrary, what numbers may be made to groan under one of the worst of political oppressions, the sense of receiving injustice under the mask of law, of drawing from what should be the fountain-head of purity a draught of bit-

terness and corruption. We believe the former to be the true picture, that for one case of oppression or corruption, there are a thousand productive of good to the individuals and justice to the country. But we must not be blind to the fact, that this entirely depends upon the character of the magistrates; that however excellent they may in general be, a sense of abstraction from public censure has a direct and continuous tendency to corruption, and that the subject has a right to all the securities which a government can give for the purity and wisdom of those who administer the laws. A power of appeal by a writ of certiorari, in all cases, to the King's Bench, is a direct security both for the good conduct of the justices, and for attention and care in those who appoint them. Frequent reversals of the decisions of one justice would not only require his removal, but in some measure reflect disgrace upon those who appointed him, and prevent similar selections. The mere knowledge of such a—not theoretical but practical—liability, would stimulate his exertions to the performance of his duty. Few writs of certiorari, we believe, would issue, but the knowledge that they might is enough to operate as a great control to indolence or partiality; mankind are governed by their apprehensions, by the probable and the possible, as much if not more than by realities. If many such appeals to the King's Bench were successful, it would prove the justice of that privilege; if not, the judgment of the magistrates would be justified.

The proceeding by certiorari, is not an appeal by which the whole case is again reheard, but a removal and submission to a superior court of the record of conviction. That record contains the fact charged against the defendant,¹ and the evidence advanced to support it, and the superior court decides whether that fact constitutes a legal offence, and whether that evidence substantiates the fact. Where the subject is deprived of the trial by jury as to the fact, his right of reference upon matters of law to the highest tribunal becomes the more essential; and guarded by proper restrictions cannot be pro-

¹ Or, rather, it ought to contain it; for by a return to the House of Commons for 1835, in a vast variety of summary convictions, it appears that in some cases no evidence was taken down, and in many the notes were subsequently destroyed.

ductive of mischief. Due notice to the justice, with an obligation to enter into a moderate recognizance, with sureties, for prosecuting the certiorari, and a power in the justice to enforce the penalty immediately, and invest it with the county treasurer till the final decision, offer sufficient securities against an abuse of this privilege by the defendant, either from motives of vexation, or for the purpose of delay.

Originally convictions were quashed upon defects which had little relation to the *substance* of the charge; for the judges, in vindication of the common right of trial by jury, and acting in the spirit of our ancient institutions, regarded these convictions with a jealous eye, and held them to stricter forms, and a more elaborate technicality than indictments and ex-officio informations; this strictness has been gradually relaxed by various statutes. As none therefore but substantial objections, such as relate to the very essence of the offence and the jurisdiction of the magistrate, can now prevail; it is the more incumbent that they should be open to the best legal investigation. It is singular enough, that a few years back, a friend of liberty complained in the House of Commons of the paucity of these prescribed forms, and asserted that the length and particularity required by the general law in drawing up convictions was a great hardship upon the subject, forgetting that there is no better security against illegal convictions than the particularity which the judges have invariably required in their several parts. *A short conviction is a potent scourge in the hands of a corrupt justice.*

Such are the principal matters over which the direct operation of this institution extends. Its *collateral* effect is felt in the character of that class out of which the body is formed, and consequently of those over whom their influence extends. If every constable over the country was a police officer, and none but police magistrates were justices, not only would a system of espionage be introduced into every village, but the country gentlemen who now perform the functions of justices of peace, being stripped of their authority, and with their authority of such local knowledge as they collect in the exercise of it, would not only lose their due weight in the county, but a stimulus to useful activity, a capacity for public affairs in a direction in which it may be

safely exerted. How different an appearance would the assizes present, if instead of the gentlemen of the county assembling voluntarily, and taking an interest to behold the exercise of judicial duties, which at other times devolve upon themselves: if instead of men of the best condition coming to serve upon the grand jury, and adding, if not in reality, at least in the public eye, importance to the judicial proceedings by their presence, none were to attend but those brought by a compulsory process, or attracted by idle curiosity! and such would be the consequence, if their interest in the proceedings as magistrates was destroyed. Instead of the aristocracy of the county, giving by their assemblage a certain state to the presence of the judge, he would be received by a few police magistrates, some personal friends of the sheriff, and the rabble of spectators with which the courts are commonly crowded.

It is one of the characteristics of the English government, as it always has and must be of free governments, that much of the civil and political action is directed by the people. As the possession of power uncontrolled is the most fatal corrupter of man, so its exercise within limits which the possessor himself must measure according to certain fixed rules and principles, strengthens the character and improves the moral sentiment. That nation, where none of its subjects stand in the above condition, except as immediate paid servants of the government, is without one of the qualities of freedom; if accident should give it free institutions, the spirit which can alone maintain them would be wanting. As the love of liberty, that is, of power modified and restrained, which makes Englishmen legislators, makes them also administrators of the law; so the same spirit which fits them for one fits them for both, a hatred of tyranny and therefore of injustice. It is true that this spirit, as it has advanced, gradually controlling power and moulding a free constitution, has broken into occasional excesses; having the strength of the woods, it has sometimes forgotten the proprieties of the city. But no man thinks the House of Commons a useless or injurious assembly, because some passages in its history are unamiable even in the eye of freedom. So with respect to the immediate subject of these considerations; it is no

impeachment of the system because some of its members are found or suspected to act with corrupt oppression! It is possible that by a change all might be changed except the very oppression complained of. When, from the parish constable up to the lord-lieutenant of the county, a certain number in each rank of life are employed without emolument in administering the laws, some as a civil duty, others as a privilege; it is impossible not to feel that the bond of society is strengthened, and the frame of civil government less liable to be shaken by popular tumult, or sapped by undue influence. Men, under such a condition, feel more distinctly not only the limits which duly restrain them from violating others' rights, but the power which may enable them to protect their own.—Order is preserved in the state as it were by an invisible influence, or in a shape which inspires confidence; the finger of government is not seen in perpetual operation, directing the minutest action of civil arrangement.

It is generally supposed, and with more truth perhaps than most historical dogmas, that the municipal privileges conferred in the middle ages upon chartered towns was a main step to freedom and civilization. Not the least of these privileges was the judicial power co-extensive with the limits of the district; here the municipal magistrate felt his own strength in the possession of this right, and the rest their security in being withdrawn from the feudal jurisdiction; here the outraged burgess first found in his neighbour a person invested with power to defend his property from spoliation and person from aggression; protection came to him in the form of civil authority, and not with the terrible aspect of military power. The judicial character was here supported, neither by the strength of arms nor by the direct appointment of government, but the higher class of citizens electing the magistrates from amongst themselves, it seemed the natural result of station rather than of office. In this respect our justices of peace hold some resemblance; for their appointment, by the lord-lieutenant, ought to be made according to their station and character, and so made it takes the form of an honorary and civil duty, not an official place. The duty which flows from station, and that which arises from office, though perhaps of equal obligation, are of somewhat different

appearance; the countenance of the former is mild, and whether in service or command, more congenial to the nature of man; its obedience wears the air of being voluntary, its claims to enforce obedience seem to spring from the natural arrangement of the world, where inequality of power appears every where a necessary principle. The duty of office, on the contrary, is forced and artificial, fixed by unbending rules, by specific contract. When the former interferes to punish or restrain, it may be supposed to sympathise with the injury it redresses, or the pain or privation it inflicts; but the latter is like a cold abstraction, impassive to common sympathies, condemning according to the strict letter, and punishing without emotion.

In this view of the system, as it exists at present, there appear two obvious defects in it, which are both susceptible of a remedy. The first is a final jurisdiction both in summary proceedings and before a jury, not sufficiently controlled; the other is an indiscreet or careless appointment of persons to fill the offices of magistrates. The first has chiefly arisen from modern legislation, from positive enactments called for and supported by reformers, and opposed to the expressed opinions of the most eminent judicial names of different parties. The other lies at the door of those great functionaries in whom the appointment of the justices is vested. None but men of education and character should be allowed to administer judicially the laws of England. Such are to be found, happily, as well amongst men of moderate fortunes as amongst the possessors of large hereditary property, and it is in such alone that any security for the impartial exercise of these duties can be looked for. Yet in some counties are to be seen upon the bench of justices, men possessing but little character and less education, placed there by some powerful influence in the county, for other qualities than those which the station demands. It is from the general folly, and occasional corruption of these, that a stain is in danger of falling upon the whole body; and an excellent institution may finally become odious to the people from the want of a proper selection of those who are to administer its duties. The regular course of honest and prudent conduct in a judicial body, though sure in its operation, is gradual and silent; but an act of folly or

fraud in any one of its members is easily discovered, and the fame is loud and general.

It would be approaching to a remedy for this last-mentioned evil, if the qualification by estate were raised. Not that any one supposes a man's sense or honesty to be commensurate with his wealth; but because the possession of moderate wealth has a tendency to raise the owner above the influence of the grosser forms of corruption. It also approximates towards a security for good sense or good education; sense, if he has acquired it by his own exertions; education, if it is inherited. It may be said that raising the qualification might exclude some excellent magistrates. Unquestionably it might, and probably it would; but that occasional loss of the good would be immeasurably more than compensated by the perpetual absence of many bad ones—men who become magistrates, not as the due appendage of their rank, but because it lifts them from obscurity, and gives them station: who receive it not as an obligation which they are bound to fulfil, but as a power they are ambitious to exercise. Whilst such men form part of the magistracy, the enemies of the system will never want just grounds of complaint, though they may mistake the real causes.

In suggesting these practical points of improvement, we have avoided the two opposite errors of reformation;—violent and organic change on the one hand, and on the other, a blind and bigoted reference to the original causes and forms of the constitution.

The first is at variance with every improvement, with every permanent alteration, that has ever taken place in this country. Our constitution, in all the various changes and modifications of its superstructure, stands yet upon the old foundations. The English historian has not to unfold successions of new systems, but gradual adaptations to changing or increasing wants; he has a building to describe, not made to please fantastic critics, but for family use and household comforts; for storm as well as sunshine. Though it has been built up amidst "brawls and giddy factions," though there has been much of fantastic writing and illogical declamation attending every addition or repair, yet ultimately the people have found that for the purposes of legislation;

“ Not to know at large of things remote
From use, obscure and subtle, but to know
That which before us lies in daily life
Is the prime wisdom.”

Neither have the improvements in our institutions resulted from a recurrence to the original forms in which they were first established, or to the causes which led to their establishment. When, indeed, these are regarded as the means of enlarging our knowledge in the formal modes of effecting alterations, as a lawyer looks into precedents to acquire facility in framing new forms to suit fresh combinations ; or when we inquire into their causes to compare those causes with the present state of civil and political relations, and thence to infer the expediency of inclining institutions more or less to their original shapes, the object is legitimate and serviceable. But when the origin of institutions is retraced with antiquarian pedantry, and used either, on the one hand, as the sole standard of all change, or on the other hand as a scoff at the practical deviations from their appearance as recorded in history, (a species of sarcasm used with a whimsical inconsistency by those in whose mouths the wisdom of our ancestors is a jest,) it becomes a misapplication of knowledge, the danger of which exceeds even the absurdity.

The real questions for consideration in the reform of any establishment are not the extent of deviation from its original form, nor even the final causes of its first creation, but whether the ends it is presumed at present to fulfil are beneficial, and how far it approximates to the accomplishment of those ends. All institutions originating hundreds of years ago must have deviated greatly from their first forms, or have been broken to pieces by the shifting currents of events ; to look to what things were, is some guide to a reflecting mind in the framing of new modifications ; to display that knowledge gives authority and weight to opinions, and carries away the multitude like robes and titles ; so far such learning is of importance to the object of reformation ; but to refer to antiquity for the adaptation of modern appliances to modern wants, is to guess from the source of a river into what sea it may discharge itself, instead of ascertaining the fact at its estuary.

We cannot conclude these observations without one remark upon a ground of opposition frequently taken up against proposed reformatations. Difficulties thrown in the way of improvements because they will occupy more time, or overload the courts with business, are amongst the most disgraceful modes of opposition resorted to by those who tremble at all innovations. They imply a total ignorance or disregard of the objects of law and government, with a cunning perception of what has the strongest tendency to enlist upon their side the selfishness of power. It cannot be too often repeated, that to hurry the execution of laws is an atrocious tyranny; it were scarcely worse to trust to the wisdom and benevolence of an irresponsible will, than to the pretended administration of laws confided to the ultimate decision of ignorance, or limited to a particular time by some arbitrary allotment; or by any other measure than that which is required for a full and complete investigation of every case.

It has been suggested by the Commissioners, who have made a valuable report upon the subject of county rates, that the present Court of quarter sessions should be abolished in respect to the trial of prisoners; and a lawyer substituted in their stead. Not, indeed, as a single measure, but as forming part of a system for dividing the country, for such judicial purposes, into smaller districts, and appointing more frequent periods of trial. To this suggestion we cannot accede; the whole train of our reasoning upon the existing tribunal, is founded upon different and opposite views; even the shortening the interval between commitments and trials would impose an intolerable burden upon the juries, without adequate relief to the offenders. It is extraordinary how the most enlightened understandings, when once they set themselves to improvement, are liable to overlook all evils but the one they seek to remedy—the frame of society is constructed to preserve the many from the few, the quiet from the restless, the honest from the thief; and yet there is to be an incessant call upon the attendance of juries, witnesses and functionaries, to preserve the latter description of society from a short imprisonment before trial,—an infliction which after all is, we believe, invariably taken into consideration in diminution of the sentence upon conviction. This, it is true, is not

applicable to those who are really innocent under circumstances of apparent guilt; but to those the whole proceeding is an evil,—the commitment, the trial, the public shame; and for this we fear there is no complete remedy, whilst man's judgment upon testimony is fallible; but there is a mode of diminishing this evil, namely, care and selection in the appointment of justices with honest intentions and judicious views.

A gentleman, well known for his active and discriminating benevolence, being requested to consider the case of an injured individual, made answer: "Sir, I have no sympathy with injured individuals, and I always distrust a man with a case." We are much of this gentleman's way of thinking, and the very last class of injured individuals with whom we feel the least inclination to sympathize are persons suffering from *unproved* accusations of dishonesty, for trials on false or unfounded accusations are certainly not frequent enough to call for the consideration of the legislature.

There is also an objection to the substitution of barristers for the present tribunal of justices, which appears to us entitled to great consideration, and, if we are correct in the following supposition, decisive. The constant succession of circuits proposed, will take away all chance of practice, and, therefore, all inducements to attendance, in the superior Courts. Is it possible to suppose that the men appointed to this judicial office, however learned in the law at first, will, without any collision with other legal minds, without attendance at the trial of causes, without occasionally breathing a legal atmosphere, preserve that learning? Will they not in a short time sink to a level in legal knowledge with the chairman of the quarter sessions, without having the counterbalancing advantages which his station and fortune confer?

Differing, however, as we do, upon these points with the Commissioners, we cannot but express our opinion of the value of many of their other suggestions, not adverted to here, because not bearing immediately upon the precise subject of this article;—one other, indeed, there is, intimately connected with it, and therefore not to be passed over, namely, the attendance of counsel at the quarter sessions; this they recommend as eminently advantageous, and in this we fully concur. It is of

great public utility, in which term is included utility to the innocent prisoner; for whatever tends to a full investigation tends to his acquittal as well as to the conviction of the guilty; and the nearer these objects are attained, the greater is the public benefit.

S.

ART. II.—LIFE OF MR. JUSTICE BULLER.

As Burke's name in the Senate, is the name of Buller in Westminster Hall. Few political questions of enduring interest have been discussed during the present century within the walls of St. Stephen's, in which appeals are not repeatedly made to the authority of the sagacious statesman, "looking both before and after;" his warnings full of prescience, his sayings of comprehensive wisdom, and treasures of judgment and imagination, are lavishly drawn forth by each succeeding speaker, as certain to enforce conviction and conclusive of the debate. A similar respect is paid in the Courts to the opinions of the judge. In discussing principles of law, his dicta, his doubts, more weighty than other men's certainties, the inclination of his opinion, though not always assented to, invariably command respect both from the bench and the bar. We shall proceed to trace the rapid and brilliant course to legal eminence of this able lawyer,—the alumnus and colleague of Lord Mansfield, destined and worthy to have been his successor, the master spirit though not the chief of his Court.

Francis Buller was the second son of James Buller, Esquire, one of the members for Cornwall, by his second wife Jane, a daughter of Allan, Lord Bathurst, and was born at his father's seat, in 1746. The family, from its antiquity and alliances, had long been eminent among the ancient aristocracy of Devon and Cornwall. Notwithstanding the incredulity of country gentlemen, some lawyers have pedigrees. The portrait of an ancestor in his judicial robes, hung by the bed side of the room in which he was born, and may have given the first impulse to his childish aspirations. He was placed in a private school in the West of England; and then, instead of being removed to the University, was transferred,

with his own entire consent, to an attorney's office. He was determined to make himself thoroughly master of his profession, and, like a good artificer, in the words of Lord Bacon, "did not dread the smoke and tarnish of the furnace." In Trinity Term 1767, he was matriculated at the Middle Temple, and became a pupil of Mr. Ashurst, a celebrated special pleader, with whom he afterwards sat as colleague for many years upon the bench. The advantages to a pupil of a special pleader's chambers, depend almost exclusively upon himself. The great majority may be characterized as West-end, or drawing-room pupils, and pay their 100 guineas, read the newspapers, discuss the topics of the day, copy a stray opinion, draw a declaration on a bill of exchange, make up a rubber at billiards, and exeunt. By students of this class was Buller tempted, but had too much firmness to yield to their temptations. In mature life, when in the company of a young gentleman of sixteen, he cautioned him against being led astray by the examples or persuasion of others, and said, looking back with pardonable complacency to his own fortitude, "if I had listened to the advice of some of those who called themselves my friends when I was young, instead of being a Judge of the Court of King's Bench, I should have died long ago a prisoner in the King's Bench." The first to enter, and the last to quit chambers, eager to unravel the mysteries of that subtle science, and delighted with its logical finesse, he soon became a useful, and of course favourite pupil. At the expiration of two years he took out a certificate as special pleader, and being warmly recommended by his late tutor, he was soon fortunate enough, notwithstanding his extreme youth, to acquire a large practice and many pupils. He was called to the bar, by the Middle Temple, in Easter Term 1772, at the earliest opportunity that he could be, not having an academical degree to shorten the probationary period of five years. In a work entitled, "Strictures on the Lives of Lawyers," and written by a shrewd observer, it is asserted, that his accession to business was immediate, and his practice as a barrister considerable from the first. In Term business he had no equal, and in every motion of consequence or special argument, he was always engaged, and at home. Very early in life he seemed to have entered into

a recognizance to think and talk of nothing but law, to make himself the Sulpitius or Coke of his age. His astonishing success introduced the custom of making special pleading an introduction to the profession. It had hitherto been the fashion for students to saunter through the Courts, and to catch any stray fragment of legal law amid the intervals of gossip; a plan of desultory study still much in vogue with our professional friends on the other side the Channel. For the talents of an advocate, says Espinasse, and legal acquirements, Buller soon ranked among the first of his day. To show the extent of his practice at the bar, it is only necessary to refer to Cowper's Reports, where there will be found few cases of any importance, in which his name does not appear; and his arguments were equally distinguished for research, ingenuity, and sound law. It has been asserted indeed, probably with truth, that he was more successful in his addresses to the Bench, than to Jurors; he was unfortunate in his speeches to the passions, and could not make a forcible appeal to the feelings and the heart. However shrewdly he cross-examined, however pertinently he pointed his remarks, with whatever dexterity he managed the details of his case, there was still wanting the happy art, by which a skilful counsel identifies himself with his client, makes others feel by appearing to feel himself, with playful sarcasm laughs a case out of Court, or in the storm and tempest of his passion, hurries along the twelve honest men in the box, and compels their verdict in his favour. But though Buller could not vie with such a leader at *Nisi Prius* as Dunning, who played with his audience as on a musical instrument, he was superior to the Wallaces and Lees of his day; and appears, during his short continuance at the bar, to have been retained in all the trials of interest which amused that frivolous age. Among these we may instance the trial of the Duchess of Kingston, the extraordinary case of the Chevalier D'Eon, and the trial of Doctor Dodd. It may be mentioned as a curious proof of the inefficacy of even capital punishments to deter from crime, that the foreman of the jury, who was most eager to convict Mr. Buller's unfortunate client, and to over-rule the more compassionate feelings of his brother jurors, should himself have been tried subsequently before Mr. Justice

Buller for forgery, and, meeting with the same rigid justice he had before exacted, been convicted. At an early period of his professional life, Mr. Buller gave to the world, in his own name, the first treatise ever published on the law of Nisi Prius; it long continued, as the author intended it should be, a favourite Vade Mecum on circuit; and being published at a time when good treatises were rare, could not fail to enhance highly the legal reputation of the author. Though without much pretension to literary elegance and style, its definitions are given with clear, logical precision; its decisions are noted down with accurate brevity, and his exact method assists, while it never perplexes the learner. It was never affected to be denied, that the work was compiled from a collection of cases made by Mr. Justice (afterwards Lord) Bathurst, for his own use, and that he had given the manuscript to his kinsman to assist him in his studies. They, however, who remember the jejune and feeble talents of Lord Bathurst, may well believe that the treatise when it passed from his hand was a mere shell or skeleton; that it required Buller's plastic and vigorous arm to endue it with sinews, and flesh, and muscle. The jealous rivals, indeed, whom he had outstripped in his profession, affected to represent the publication as a disingenuous attempt to raise a spurious fame, by assuming the title of author of a book which was the work of another. Mr. Buller never condescended to notice the calumny, which was indeed, in the pithy language of Lord Mansfield, too important to be contradicted. From the first, the talents of the young lawyer had attracted the notice of the venerable judge; he had admired his perspicuous and inductive reasoning, his clear method, that perfection of forensic oratory, which says no more than just the thing it ought; his copious reading; and the nice acumen with which he could distinguish between apparently conflicting decisions, and search out the true principles of the law. The father of the King's Bench was aware, that his health and strength would be shortly on the wane, and anxiously sought a colleague on whom he could rely as another self, to whose more youthful vigour he might delegate a portion of his duties when they should become onerous, and on whose judgment he might lean with confidence, in all cases of difficulty and doubt. Accordingly

on the death of Sir Richard Aston, which occurred in Hilary Term 1778, Lord Mansfield strongly recommended Mr. Buller as his successor, and the Chancellor lost no time in offering the vacant judgeship to a young man, then only thirty-two years of age,—an instance, we believe, without parallel in the modern judicial annals of our country. In a pecuniary point of view the offer presented no attraction, the income of a puisné judge of the King's Bench, being then only two thousand two hundred a year, a sum scarcely a fourth of what a counsel in leading practice might expect to realize. He had already received a silk gown, and been appointed second judge on the Chester circuit, and stood at the vestibule of all the public offices leading to distinction. But the proposal had still a great charm to an ambitious and weary man; his constitution, naturally weak, had threatened to give way under those hard task-masters,—the daily toils of his profession,—and he sighed for the comparative repose of the Bench. His hopes, too, were flattered with the promise, that his illustrious patron would, on retiring, exert all his influence in his favour; and, that being associated with him a few years, on his shoulders would descend the mantle which had been worn by the legal seer. After a coy delay, on the 6th of May 1778 he took his seat as junior judge, on the side cushions of the King's Bench. "If any one were arrogant enough at the time," writes Mr. East, in his Introduction to the Pleas of the Crown, "to question the judgment of Lord Mansfield upon that occasion, the very active part which Mr. Justice Buller sustained, in the administration of justice, for more than seventeen years, during which time he sat in the Court of King's Bench; as well as the share which declining health permitted him to take in public business, during the six years he was a judge at the Court of Common Pleas, would most decidedly prove the discernment of that noble and enlightened magistrate, who left the public to regret, as little as possible, the infirmities which prevented the continued exertion of his own splendid talents; when to the abilities of the other judges of his Court, he added the industry, sagacity, quickness, and intelligence, for which his protégé was most eminent. And perhaps the wisdom of Lord Mansfield's recommendation cannot be more strongly evinced than by recollecting, that the whole business of the sittings in West-

minster and London, during the last two or three years of his being Chief Justice, was conducted solely before Mr. Justice Buller, in the course of which many great and important questions, extensively affecting the real and commercial interests of this country, were determined by him, with a promptitude and justness of decision which would alone place him very high in rank among those judges whom this country has been used to regard with admiration and reverence." To this high praise we may add the tributes of two other learned contemporaries. "His speeches from the Bench," we are assured, "approached as near perfection as modern example reaches: they were models for imitation. He possessed the greatest quickness of apprehension, saw the consequences of a fact, and the drift of an argument, at its first opening, and could immediately reply to an unforeseen objection: his perception was almost too quick, it sometimes exposed him to the charge of impatience and petulance. Endued with the greatest inflexibility of sentiment; he was, like Holt, too staunch and systematic a lawyer, to suffer the stubborn principles of law to give way to the milder influences of equity. The animation with which he spoke was imposing and impressive, and the earnestness of his delivery commanded alike attention and conviction. From the distinctness of his voice not a word was lost, and this gave effect to his language, which was clear and correct, but without any affectation of ornament or classical allusion. His summings up of evidence to jurors were master-pieces of conciseness and perspicuity. Mr. Justice Buller possessed, to a degree that I never saw equalled in any other judge, the distinguishing gift of seeing at a glance, the point on which every case before him turned; he stripped it at once of all circumstances which did not go to the merits, and to these alone he kept the evidence strictly confined. By such means the cause paper was got through at the end of every sitting; and the suitors of the Court were relieved from the anxiety of suspense, the torment of remanets, and the impoverishing punishment of refreshing fees. Precipitancy of decision was imputed to him as a fault, but it was the decision arising from talent, which saw at one view the bearing of the facts on the doubtful points of the case, and the principles of law to which the attention should only

have been directed." The beginning of the year 1788 saw Buller at the summit of his professional eminence, on the point of grasping, in the general expectation of the profession, that power in name of which he had long possessed the reality. While Mr. Justice Ashurst presided in the King's Bench, Judge Buller had in effect been the Chief Justice, in every respect but in possession of the title. The patronage which belonged to the office, it was understood, Lord Mansfield had wholly resigned to him during his retirement. His regulations and rules of Court were uniformly sanctioned by him, and his recommendations to office invariably attended to. In disposing of the business of the Court he was absolute. The passive indolence and inertness of Ashurst left him without control, and Judge Grose had too recently come from the Common Pleas, and was too little acquainted with the practice of the King's Bench, to presume to interfere. His assumption over his senior was noticed by the bar, and one of them having remarked to Cowper, the King's Counsel, how Buller trespassed on the province of Ashurst; "Pooh!" said Cowper, "that's nothing, don't you see," pointing to the senior's rubicund face, "how he himself gives colour to the trespass." Our readers, who are not professional, must be willing to believe that the jest was a good one, for we dare not hazard in their behalf that most forlorn of all Quixotic undertakings, the attempting to explain a joke. Not only over the chief Court of Common Law but over the Court of Chancery also, was Judge Buller at this time called upon to preside. Lord Thurlow in his frequent absences through illness or affairs of state, placed more reliance on Buller than on any other substitute; and, on resuming his seat, would highly eulogize the decrees of one whom he, in common with all the world, felt bound to respect and admire.

In the summer Lord Mansfield resigned, and "a change came o'er the spirit of his dream." The wishes of the venerable peer, to secure which he had exerted all those arts of diplomacy for which he had in earlier life been so famous,—the general hopes of the profession, who contrasted the courteous bearing of Buller with the rough deportment of his rival,—his own high claim from having performed unfeigned so long and so ably the arduous duties of the office,—were all alike disregarded. The prime

minister, Mr. Pitt, was one who scarcely ever rewarded any but political services ; and even in his judicial appointments had respect for previous merits in Saint Stephen's Chapel. To Buller, except in the remembrance of a few courtesies which that learned judge had shown him on his first Western circuit, he was almost wholly unknown ; but Sir Lloyd Kenyon, an honest and admirable lawyer, had served him faithfully for several political campaigns, and had fought his battles, in advocating the Westminster scrutiny, one of the most unwise and unpopular acts during his administration. With characteristic hauteur he controlled the choice of the Chancellor ; and, notwithstanding his curses, muttered loud and deep, insisted on bestowing the second vacant prize, the Mastership of the Rolls, on another staunch political friend, Sir Pepper Arden. The sole reward which Buller got for his valuable labours was the promise of a baronetcy, to which rank he was elevated the following year. That he felt the disappointment keenly could have afforded no surprise ; it was not confined to himself—a general feeling of regret was excited among the whole of the King's Bench bar, in whose estimation he stood so very high, not merely for the extent of his legal knowledge, but for his conduct towards them on the bench, and for his general urbanity as a judge. They had no flattering anticipation of courtesy from Lord Kenyon, such as they had been in the habit of receiving from Mr. Justice Buller, and they found their apprehensions not without foundation. Disappointment, however, did not induce the learned judge to resign, or immediately to change his seat to another Court. He resumed his place in the King's Bench, but with evident chagrin and dissatisfaction, which the temper and manners of the new Chief Justice were but little calculated to remove, or to reconcile him to that change of situation which his appointment had occasioned. Too able a lawyer to require the assistance of others to enable him to form an opinion, and too proud to ask it, Lord Kenyon rarely condescended to consult the other judges, or inquire their judgment. He did not wait for their expression of approval or dissent, but made rules absolute or discharged them on his own discretion only. On arguments he pronounced an unhesitating opinion, and left the other judges to agree with him, or differ from him, as they thought

fit; the latter was of unusual occurrence, though Mr. Justice Buller sometimes astonished the surly chief, by explicitly dissenting and assigning very cogent reasons for his dissent. To descend to the low and level consequence of his brethren, who had been used to look up to him, was ill suited to his high mind; he had been the president of a liberal republic, he was now the vassal of an absolute monarchy. His opinions had swayed implicitly the judicial minds of his brethren; they were now exposed to the angry bay of Kenyon, and the snappish yelp of Grose. He bore the change for a few years, when, forsaking the Court in which he had practised all the years of his life, he retired from the King's Bench into the Court of Common Pleas, and became a puisne judge of that Court in 1794.

Mr. Cradock, in his lively memoirs, gives an interesting account of an interview with Judge Buller, shortly after his disappointment, when his health and spirits were declining. "This judge," he says, "had great quickness of intellect, and strict integrity, but was not always so guarded, either in his charges or opinions, as might have been wished. He was affable, friendly, temperate at the table, but unhappy, and had resort too frequently to whist to divert him from uneasy thoughts. This seeming attachment to cards rendered him liable to censure, especially on the circuit. One of the last times I ever met him at dinner was on the day of his coming to Leicester, at the house of an eminent physician there. His lordship took leave of the company about twelve o'clock, but lingering for awhile he returned to the table, and we played whist for several hours. At the assizes, on the Sunday, we all dined in the Newwork's, Leicester; there were present, Judge Buller, Counsellor Newman, and some gentlemen, who were all to meet again next week at Warwick; the general conversation was Donellan, and his guilt was asserted by all; the only doubt seemed to be, that as Lady Boughton, the mother, was all but a fool, her evidence, which was necessary, might not be effective; but it was acknowledged that she had been privately examined at the judge's chambers in town, and they thought she might be produced. I am sorry to say it, that Judge Buller's charge at Warwick was imprudent, for it prejudged, or rather condemned Donellan." The circumstances of

this extraordinary trial, which excited intense interest at the time, and was made matter of grave and serious imputation upon the presiding judge, are implicated too closely with his character as a criminal lawyer not to require more than a passing notice.

Captain Donellan had married the only daughter of Lady Boughton, a widow, whose son, Sir Theodosius Boughton, was then about twenty, and would, on attaining his majority, succeed to a fortune of above two thousand per annum. The families lived together at Lady Boughton's seat in Warwickshire. The young baronet, who had led a somewhat irregular life, became slightly indisposed; and his mother administered to him, as she thought, one of those innocent draughts which apothecaries are apt to furnish on such occasions. Before giving it she perceived that the smell was very extraordinary, exceedingly bitter, and very like the smell of laurel water when it was afterwards shown to her. The unfortunate young man took the draught, and on Lady Boughton returning to the room, in about ten minutes, was found with his eyes fixed, and hands clenched, foaming at the mouth, and apparently in the agonies of death. He expired before any medical aid could be procured. Captain Donellan wrote shortly afterwards to his guardian, to mention that the young man had died of fits, and to inquire whether there should be a post mortem examination. The guardian replied that it should certainly take place, for the satisfaction of the survivors, without delay. Various delays were, however, allowed to interpose; and when the medical men at last met, the majority were of opinion that the body was not in a fit state to be dissected. Captain Donellan suppressed this fact when he wrote again, but said the physicians had come, and all was done, as wished. Accordingly full permission was given for the funeral, and the body of the deceased baronet was interred on the eighth day after his death. But the suspicions of the neighbourhood were roused; rumours of poison daily gained strength and consistency; the coroner for the district issued his warrant, and the body was exhumed. A partial dissection took place, but the head was not opened, nor were those chemical tests applied to the contents of the stomach, by which the presence of mineral or vegetable poison is now so

commonly detected. When Lady Boughton was examined at the inquest, she deposed to her son-in-law having washed the phials in which the draughts were contained, in spite of every opposition she could give, on which Captain Donellan was observed to lay hold of her by the sleeve, as if attempting to check her from giving that fact in evidence. The coroner and jury sat three days; on the last day Donellan, becoming alarmed, wrote them a letter stating, he felt it his duty to give them every information he could; that the deceased used to have arsenic by the pound weight at a time, to kill rats, with which the place abounded; that at table they had not eaten knowingly, for many months past, any thing which they perceived him touch, as they well knew his extreme inattention to the bad effects of the numerous things he frequently used to send for. The scope of the letter was to lead the jury to believe, that the young man had inadvertently poisoned himself; but its statements were wholly untrue. The inquest returned a verdict of wilful murder against him; and on his trial before Mr. Justice Buller, other facts, still more pregnant with guilt, were elicited.

It appeared, that in a conversation with a fellow-prisoner, who asked him if he believed that Sir Theodosius was in truth poisoned, he replied, "I make no doubt of it. Lady Boughton and the apothecary being mentioned as instruments, he said, "I don't know which of them, but it is amongst them." He afterwards wrote a letter, and desired it to be sent unsealed, as it was, to Mrs. Donellan. "No longer remain where you are likely to undergo the fate of those who have gone by sudden means, which Providence will bring to light by and by. In my first letter to you from Rugby, in November last, I mentioned to you a removal; I had my reasons, which will appear in an honest light in March next, to the eternal confusion of an unnatural being." As another proof of the self-contradictions of a guilty man, it was deposed that at the time the body was opened Donellan said, there was nothing the matter, that a blood-vessel had broken. But the main fact of suspicion, which weighed so heavily on the mind of the learned counsel who was brought down special to conduct the prosecution, that he exclaimed on hearing it, "Now I have the rope round his neck which will hang him," was, that he had for

some months used a private still ; and that he had distilled the juices of many plants and shrubs, laurel amongst the rest. What more easy than for him, secretly, to have filled a phial with laurel water, and to have substituted it for the real draught in the sick room. On the day of the death he had this private still completely rinsed and purified ; five or six medical men deposed, that to the best of their judgments, a draught of laurel water had been the cause of death ; but their science was found lamentably defective on cross-examination, and their knowledge of poisons to be very slight indeed. Against such a mass of evidence, what course could the counsel for the prisoner pursue ? If poison had indeed been given, who could be the poisoner but the shuffling, equivocating, self-contradicted, self-condemned prisoner at the bar ?

Mr. Newman, with great discretion, founded his defence on the fact that the death was not occasioned by poison, and in support of his position put into the box Mr. John Hunter, the most celebrated anatomist of the day. His examination was most important ; the whole appearances, he said, on the dissection, explained nothing but putrefaction.

“Q. Are the symptoms that appeared after the medicine was given such as necessarily conclude that the person had taken poison ?

A. Certainly not.

Q. If an apoplexy had come on, would not the symptoms have been nearly, or somewhat similar ?

A. Very much the same.

Q. Have you ever known or heard of a young subject dying of an apoplectic or epileptic fit ?

A. Certainly : but with regard to apoplexy not so frequent. Young subjects will perhaps die more frequently of epilepsies than old ones : children are dying every day from teething, which is a species of epilepsy arising from irritation.

Q. Did you ever in your practice know an instance of laurel water being given to a human subject ?

A. No, never.

Q. Is any certain analogy to be drawn from the effects of any given species of poison on an animal of the brute creation to that it may have on a human subject ?

A. As far as my experience goes, which is not a very con-

finer one, because I have poisoned some thousands of animals they are very nearly the same. Opium, for instance, will poison a dog, very nearly similar to a man. Arsenic will have very nearly the same effect on a dog, as it would have, I take for granted, on a man.

Q. Have you ever had an opportunity of seeing such appearances on such subjects?

A. Hundreds of times.

Q. Should you consider yourself bound by such an appearance to impute the death of the subject to poison?

A. No, certainly not. I should rather suspect an apoplexy; and I wish in this case the head had been opened to remove all doubts.

Q. Then in your judgment on the appearances the gentlemen have described, no inference can be drawn from thence that Sir Theodosius Boughton died from poison?

A. Certainly not; it does not give the least suspicion."

The Court here interposed.

"Q. Give me your opinion in the best manner you can, one way or the other, whether, upon the whole of the symptoms described, the death proceeded from that medicine, or any other cause?

A. I do not mean to equivocate; but when I tell the sentiments of my own mind, what I felt at the time, I can give nothing decisive."

Mr. Justice Buller, in summing up, showed how little his own mind was affected with doubt. "A presumption," he said, "which necessarily arises from circumstances is very often more convincing, and more satisfactory, than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances, which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all of those circumstances. For the prisoner, you have had one gentleman called, who is likewise of the faculty, and a very able man; I can hardly say what his opinion is, for he does not seem to have formed any opinion at all of the matter. He at first said he could not form an opinion whether the death was or was not occasioned by the poison, because he could conceive that it might be ascribed to other causes. I

wished very much to have got a direct answer from Mr. Hunter, if I could. What, upon the whole, was the result of his attention and application to the subject?—what was his present opinion? but he says he can say nothing decisive. So that on this point, if you are to determine on the evidence of the gentlemen who are skilled in the faculty alone, you have the very positive opinion of four or five medical gentlemen that the deceased did die of poison: on the other side, you have what I really cannot bring myself to call more than the doubt of another; for it is agreed by Mr. Hunter that the laurel water could produce the symptoms which are described. He says an apoplexy or epilepsy would produce the same symptoms; but as to an apoplexy it is not likely to attack so young and so thin a man as Sir Theodosius was; and as to an epilepsy, the other witnesses tell you they don't think the symptoms, which have been spoken of, show that he had any epilepsy at the time."

The jury retired to consider their verdict, but their minds were as entirely made up as that of the judge; and in nine minutes they returned with a verdict of guilty. Mr. Justice Buller proceeded immediately to pass sentence of death upon the prisoner.

"John Donellan, the offence of which you now stand convicted, next to those which immediately affect the state, the government, and the constitution of the country, is of the blackest dye that man can commit. For of all felonies murder is the most horrible, and of all murders poison is the most detestable. Poisoning is a secret act, against which there are no means of preserving or defending a man's life; and, as far as there can be different degrees in crimes of the same nature, yours surpasses all that have ever gone before it. The manner and the place in which this dark deed was transacted, and the person on whom it was committed, much enhance your guilt. It was committed in a place where suspicion at the instant must have slept, where you had access as a bosom friend and brother, where you saw the rising representative of an ancient family reside in affluence, but where your ambition led you, proudly but vainly, to imagine that you might live in splendour and in happiness, if he, whom you thought your only obstacle, were removed. Probably the

greatness of his fortune caused the greatness of your offence; and I am fully satisfied, on the evidence given against you that avarice was your motive, and hypocrisy afforded you the means of committing this offence. That the deed was done by you, which not only hastened him, but must very soon hurry you to an untimely grave, has been fully proved to the satisfaction of myself and the jury; and I think it impossible to find any, even of the meanest capacity, among the numerous auditory now standing around you, that can doubt about your guilt."

The prisoner was executed the Monday following, denying his guilt. We totally dissent from the opinion of those who believe in his innocence, and accuse Mr. Justice Buller as the shedder of innocent blood. We are assured that there never was a case brought into a court of justice in which so many circumstantial facts were elicited, all tending to an irresistible conclusion of guilt: but we are by no means surprised at the sympathy which the fate of even this atrocious criminal excited. Englishmen love fair play, and their honest prejudices were excited, on learning that the chief witness for the prosecution had been privately examined; that a sort of private rehearsal had taken place; that an eminent counsel was to be brought down special to ensure a conviction; and that the judge openly avowed his certainty of the prisoner's guilt. They believed that a reasonable chance of escape was not afforded to the culprit; that the humane wish, God send you a good deliverance, was withheld from him; and their sympathies, however abhorrent of his crime, closed freely around the doomed criminal.

The medical question is fought *cum odio plusquam theologico* even to the present day.¹

The circumstances of this trial tended to confirm the general impression of Buller's rigorous severity, which two rash sayings of his had previously created. The first of these dicta was, that previous good character went rather in aggravation than in mitigation of punishment, for the longer a prisoner might have lived in the good estimation of his neighbours, the more guilt was there in his losing it. A paradox certainly

very alien from the mild spirit of a Christian judge. The other unguarded saying, which escaped from him unpremeditatedly, excited general animadversion, namely, that a husband had a right to chastise his wife with a stick no thicker than his thumb. The subject offered too fair an opportunity to the caricaturists not to be eagerly grasped at. His portrait as Judge Thumb speedily adorned the print-shops, and the women enjoyed a hearty laugh at the expense of this ungallant champion of club law.

While these light shafts of satire glanced innocently by, a more ponderous missile was hurled at his unforgiving temper by the redoubtable hands of Dr. Parr. That humane pedant having rushed with horror from the butcher's shambles at Warwick, as he termed the courts of justice there, hastened to launch the following diatribe; and however difficult to recognize the portraits, classical curiosities they certainly are. "With learning, taste, and genius, that adorned the head, but improved not the heart, one of them was a sober, subtle, inexorable interpreter and enforcer of sanguinary statutes. With a ready memory, keen penetration, barren fancy, vulgar manners, and infuriate passions; the other carried about him an air sometimes of wanton dispatch, and sometimes of savage exultation, when he immolated hecatombs at the altar of public justice. Armed with giant strength, and accustomed to use it like a giant, these protectors of our laws transferred to acts of thievery that severity which the courts of Areopagus employed only against cut-throats. If an altar of pity, like that of Athens, had been placed in the avenue to our English courts, the steps of Cynopes would not have been turned aside to the right or to the left. His eye would have darted on the emblems of the altar; with a glare of fierce disdain he would negligently have swept the base of it with the skirts of his robe. My hope is, that the mercy which they showed not to others in this world may, in another world, be shown to them." Circumstances delayed the publication of this extraordinary morceau till after the death of Cynopes, as Buller is there termed; had he seen it in his lifetime, we are satisfied, so placable was his nature, that he would have been the first to shake hands with Doctor Parr, and assure him, that the monster he had drawn, was one entirely of his own.

invention. The rigour with which he awarded the punishment of death must be imputed to the age, and not to the individual. He appears to have been less severe than several of his colleagues,—Mr. Justice Heath, for instance, who, several years after, left a man for execution, under a particular statute, for cutting down a grove of sixty or seventy young trees. Death appears to have been the dread penalty for offences against property, and the calendar of larceny to have been marked with the characters of blood. Our age is better than the last in some particulars; in none more than in the spirit of humanity which it has infused into the criminal code. We think and speak of executions in a manner and spirit totally different from our fathers; and our complaint against the judges of the last age is, that they did not, by a merciful administration of harsh statutes, anticipate the coming generation. But however inexorable after verdict, Mr. Justice Buller held the scales of justice equal between the crown and the prisoner during the trial. It used to be said of him, by those who, from their situation in life, were most likely to form a true judgment of that part of his character, that no person, if guilty, would choose to be tried by him, but that every one, if innocent, would prefer him for his judge: than which, surely nothing can describe more emphatically the general opinion of his great discernment and impartiality. Leach's Crown Law abounds with testimonies of his acuteness and discretion. On one occasion a man was tried before him for a capital offence; the witness for the prosecution deposed strongly against him, and as the case was going on a grand juror threw down a note to the prisoner's counsel, stating that the witness had sworn quite the reverse before the grand jury that morning. The statement was immediately made known to the court, and Judge Buller ruled, contrary to precedent, that the grand juror should be allowed to appear as a witness. He did appear, the prisoner was acquitted, and the witness was afterwards convicted of perjury. With characteristic good sense, he was one of the earliest to explode the test, that whenever the lungs float in water the child must have been born alive, a delusive theory, by which it is to be feared several lives have been sacrificed. In one instance only do we remember the captious spirit of the special pleader

obtaining a victory over the more expanded wisdom of the judge. It was in an indictment, laying the property in James Hamilton, commonly called Earl of Clanbrassil, whereas in truth and in fact he was earl by right and not by courtesy; the judge feared that the words "commonly called" were not mere surplusage, but would vitiate the indictment. His fears, however, were not responded to by the other judges. As a constitutional lawyer Mr. Justice Buller was thought to lean too strongly to the prerogative; but if ever justly liable to the reproach it must be confessed that he effaced it during the state trials, which darkened the latter period of his judicial life. Ill health prevented him from attending more than a small portion of Hardy's trial, but his exposition of what he deemed the law and constitution, betrayed no signs of weakness, and was most sound.

In 1798 Mr. Justice Buller was appointed the head of a special commission for the trial of O'Coigley, O'Connor, and others accused of high treason at Maidstone. His deportment during these trials, rendered remarkable by some extraordinary incidents, elicited the admiration of all parties. We do not notice the higher qualities of the judicial mind, for these he had always at command. The prisoners had been detected in clandestinely attempting to embark for France, and on the person of one of them was found a document full of treasonable matter. Sir Francis Buller delivered a charge, replete with practical sense and information. "Among the unthinking," he said, "and those who do not take a comprehensive view of the subject, much mischief may be done by artful and designing men, who aggravate the defects of one constitution, and dwell only on the advantages of others; and, notwithstanding the imperfections of human wisdom, require unerring conduct from their governors; imputing every mischief of chance to ill design and corruption, and as a correction of all these evils, they teach the people that the government are to be in their hands. They whom this latter argument may allure, would do well to consider, whether any change of government can really better the condition of the body of the people. The actual exercise of power must, from its nature, be vested in a few; it may shift where there is no monarchy, from the hands of one contending party to those of another, but the mass of

the people must remain where they are,—employed at the anvil, the loom, and the plough, or in some occupation which will afford a maintenance and support. There is nothing which prevents men of abilities, equal to great situations, from attaining in this country the highest situation and honours, of which the instances are numerous in every department. But as no state can gratify the views and ambition of every one, who may feel his fortune wearing away, may think his merit neglected, or his abilities employed on subjects below them, men of this description will look to times of trouble and confusion, as affording them opportunities, which in the regular course of settled government cannot arise, when they may obtain in a day what no length of labour could have procured, without the assistance of chance: when they may rise to sudden elevation by the downfall of others; and when, from the general misery of their country, they may, by possibility, advance their own private interest. To guard against the machinations of such restless and turbulent spirits, the common law, and the statute law of the land, have made several provisions, at the head of which the code of criminal law relating to high treason is to be placed.” The learned judge then proceeded to explain the law in his wonted clear manner. A most strange incident took place previous to the impannelling of the common jury. A clergyman, who deserves to be gibbeted to infamy, by name the Reverend Arthur Young, was complained of to the judge, as having attempted to practise with the persons who were summoned to constitute a jury. A letter of his, which was read in open court by Mr. Plumer, proved, that in the fury of his politics, he had forgotten the very elements of his Christian profession. “I dined with three of the jurymen of the Blackburn hundred, who have been summoned to Maidstone to the trial of O’Connor and Co., wealthy yeomen, partizans of the high court party. I exerted all my eloquence to convince them how absolutely necessary it is at the present moment, for the security of the realm, that the felons should swing. I represented to them that the acquittal of Hardy and Co. laid the foundation of the present conspiracy, &c. I urged them to hang them through mercy; although the judge is sufficiently stern, and seldom acquits when hanging is necessary, the only fear I have is, that

when the jury is impannelled Blues may gain the ascendancy. The three men are thoroughly sensible that they would lose every shilling by acquitting these felons."

Mr. Justice Buller heard this letter read with the indignation natural to an honest man, and exclaimed, in tones of the deepest resentment, "This clergyman ought to be punished, and very heavily." His name was repeatedly called, but he prudently kept himself beyond the jurisdiction of the court. The result of the trial was very different from what his sanguinary temper had conspired to make it. After a very humane summing up, all the prisoners were acquitted, with the exception of the Roman Catholic priest, O'Coigley, of whose guilt there could be no doubt. It was now late at night, and Judge Buller proceeded to pass sentence of death upon the prisoner. At the close of his emphatic sentence a scene occurred without precedent in a court of justice.

The hall was crowded to excess, partly with the friends of Mr. O'Connor, who had come down in crowds from London to bear witness of his character, including the leaders of opposition, Grey, Tierney, Sheridan, Erskine, and others; and partly by the officers of justice, who had mustered in large force, from apprehension of a rescue. Judge Buller directed the gaoler to remove the rest of the prisoners; but O'Connor's friends exclaimed that he was acquitted, and must be discharged. At this moment of confusion he leapt out of the dock, and a violent conflict immediately ensued, between those favouring and those opposing his escape. The lights in the immediate neighbourhood were extinguished, weapons were drawn and blows struck; and so great was the excitement that one of the counsel for the prisoner took part in the affray. The Clerk of Assize jumped on the table, and drawing a sword flourished it before the judges, who hastened to remove the weapon in safety from the hands of their trembling champion. The judges remained standing on the bench during the whole of this extraordinary riot, conscious that their presence must impose some awe, and might possibly prevent bloodshed. O'Connor effected his escape to the street, but was there retaken, and brought back to his former station; and, after an interval, the blended firmness and dignity of the judges succeeded in restoring order. Earl Thanet and Mr. Ferguson,

the barrister, were afterwards convicted in participating in this disgraceful riot, and sentenced to different terms of imprisonment and fines. It has been made matter of reproach to the learned judge, that he did not always display like presence of mind, and that he sometimes, in a moment of petulance, compromised his station. His celebrated altercation with Mr. Erskine has been adduced as a proof of this, when on the trial of the Dean of St. Asaph, at Shrewsbury, that fearless counsel persisted pertinaciously, but not more than his duty to his client demanded, in asking the jury to explain their verdict. The judge interposed with warmth: "Sit down Mr. Erskine, know your duty, or I shall be obliged to make you know it in some other way." The advocate rejoined with equal warmth, "I know my duty as well as your lordship knows your duty; I stand here as the advocate of a fellow citizen, and I will not sit down." The judge was silent, and must have felt it some derogation of his dignity, to have uttered threats which, in his cooler moments, he did not design to carry into execution. On another occasion his precipitancy allowed his quondam pupil to gain the advantage over him. Erskine, in defending a prisoner under prosecution for a libel, quoted a sentence or two from a printed book; he was hastily interrupted by Judge Buller, who said, "it was no defence of one libel to quote another, and a worse, in support of it." Erskine immediately turned to the jury, "You hear, gentlemen, the observation of his lordship; from that observation, I maintain, you must acquit my client. My quotation is from Locke; shall we condemn a writer whom the judge declares not to go the length of that great man?" But though starts of temper may, in some few rare instances, have betrayed the judge into sayings and acts of indiscretion, still more rare and unfrequent are the instances, in which the ingenuity of counsel detected slips of memory, or errors in judgment. That he sometimes decided wrongfully there is no doubt; but, considering the number of new points which daily arose for his decision, the wonder is that he should have been right in so many, and not that he was fallible in a few. But he brought to the judgment of every case, a mind saturated with learning; and in his numerous common-place books had supplied the defects of former reporters. It was

almost sad to behold him in latter days recurring, with pallid cheek and attenuated frame, to those treasures of his youthful industry; for to these and similar labours, the spectator might well attribute his premature decay.

In the winter of 1799 this venerable judge was seized with an illness which brought with it a total prostration of his physical energies. In the following year he was not able to resume his seat in Court even for a day. He delayed tendering his resignation, in compliance with the solicitations of his colleagues, and in the natural hope that he might yet regain vigour; but when two terms had passed without change, and the warmth of summer seemed to bring no restoration, he visited the Chancellor on the 4th of June, and arranged that he should resign his seat on the following Friday. He paid visits to several other friends on that morning, returned to his house, in Bedford Square, to dinner; and afterwards amused himself for a short time in playing at piquet with his neice. She observed some change in his countenance, and hinted her apprehension that he was unwell; he acknowledged that he felt himself seized with a degree of languor and faintness for which he could not account, went to bed, and early the next morning expired without a groan, the immortal spirit having departed so easily that those who stood around could not ascertain the exact moment of its departure. He died on the 5th of June 1800, at the comparatively early age of fifty-four. His body was interred, without pomp, in the churchyard of Saint Andrew's, Holborn.

He had married very early in life, before attaining his majority, and was succeeded in his title and estates by his son, Sir John Buller Yarde, who had exchanged his surname for property of considerable value. His wealth was estimated at above eighty thousand pounds, for the accumulation of a greater part of which he was indebted to his professional income. He had been bequeathed the sum of two thousand pounds by Lord Mansfield, in acknowledgment of his having performed the larger portion of his judicial duties during the last three years of his life: a munificent legacy in the opinion of many, but which, if considered as a debt,—and so, we believe, the noble lord always held it,—appears to have been made matter of very nice calculation. Sir Francis was a man of

unexpensive habits, and for several years led a life of seclusion at Turnham Green, but one Armstrong, a sheriff's officer, having retired on his gains, and built a house next door, the judge, who did not like to be thus elbowed by a subaltern of the law, withdrew to the more congenial region of Bedford Square.

In person he was below the middle stature, and of spare habit, but his countenance was remarkably handsome, and beaming with intelligence. The large lustrous eye, and commanding forehead, gave noble witness of the soul within. In private life, he united the most amiable temper with the most frank and conciliating manners; his flowing courtesy was calculated to put the young and diffident at their ease, and make those of less polished manners feel quite at home in his company. There is a tradition on the Oxford Circuit, that he once met at the first assize town with a very unsophisticated sheriff, who bluntly demanded of his lordship, as he was stepping into his carriage, whether he was a *bonâ fide* judge,—(the worthy functionary made but one syllable of *fide*), as they had been so often fobbed off with serjeants in those parts. When satisfied on this important particular, he took his seat aside of the judge. A grave severity on the countenance of Mr. Justice Buller, occasioned some misgivings in the mind of the sheriff, who expressed his fear that he had unwittingly done something wrong. "It is certainly," said his lordship with a smile, "against etiquette on these occasions for the sheriff to take his seat fronting the horses, unless,"—he put his hand on the gentleman, who was starting up,—“unless invited by the judge as I now invite you.” Cradock tells a story of his encounter with another sheriff, not unamusing. The world was then not so highly refined as at present. After the usual opening of common topics, such as the roads and the weather, the high sheriff began to feel himself a little more emboldened, and ventured to ask his lordship whether at the last place he had gone to see the elephant. The judge with great good humour replied, "Why no, Mr. High Sheriff, I cannot say that I did, for a little difficulty occurred; we both came into town in form, with the trumpet sounding before us, and there was a point of ceremony to be settled, which should visit first." One amiable trait of Mr. Justice Buller deserves especial

mention. He was the active and zealous patron of many young men in the profession, whose studies he promoted, without regarding his own time or trouble, by the kindest attention, and the most willing assistance. By a short note of compliment, or scattering a few words of praise, he has cheered the hearts of many who were drooping under discouragement, and, by inspiring self-confidence, has lifted them to eminence. To Law, when smarting under the wayward displeasure of Lord^{*} Kenyon, he displayed the most marked attention, and, by his frequent commendations, upheld the fame of that able lawyer when it might otherwise have been overborne by prejudice. To Abbott, afterwards Lord Tenterden, he was a still more efficient patron. Abbott (according to Sir E. Brydges) having become a member of his household as tutor to his sons, with the intention of afterwards taking orders, Mr. Justice Buller detected his admirable legal talents, persuaded him to choose the law as his profession, furnished him with the funds for entering an attorney's office, and thus became the fortunate means of giving to the Court which he loved, one of the ablest chiefs that ever presided over it. It is pleasant in reviewing the lives of those great judges who have ennobled Westminster Hall, to notice the alacrity with which, having profited so much themselves from generous patronage, they have sought out and cherished, latent or rising talent at the bar. With an anxious care, similar to that of the priests of old, who watched over the young ministering at the altar, that the sacred fire might never be extinguished, they appear to have been always on the search for lawyers worthy to be their successors, and deserving promotion, under whose administration, those laws which they cherished as their inheritance, might be handed down pure and untarnished. Nor has their solicitude been unrewarded. Mansfield, Buller, Ellenborough, Tenterden,—these form a series of names and titles, which shed a lustre round the law and its professors; and their memories, we may rest assured, in the proud language of Milton, “God and good men will not let die.”

T.

[We think it right to add, that Mr. Justice Buller was pretty generally suspected by his cotemporaries of an inordinate love of money and power; and that his passion for high play, and his zeal in the acquisition of borough influence, led him more than once into situations unbecoming his dignity.]

ART. III.—ON THE PRODUCTION OF CASES PREPARED FOR THE
OPINION OF COUNSEL.

IN the case of *Bolton v. Corporation of Liverpool*,¹ Lord Brougham, speaking of the decision in *Radcliffe v. Fursman*,² uses these words: "So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to, or in contemplation of, or pending, the suit or action for the purpose of which the production is sought." The principle contained in this passage is more extensive than at first sight it may appear to be. If the law is that a statement, which a client has written for his counsel, shall be disclosed in answer to a bill of discovery, it must also be law that the statement which he makes by word of mouth at a consultation is not a privileged communication. No distinction in principle can be taken between a statement *vivâ voce* and a statement in writing. The necessary consequence is, that the client may be interrogated upon matter stated in consultation; and still further, as the privilege of the counsel is but the privilege of the client, that interrogatories may also be put to counsel. A doctrine to our minds more extraordinary, or more destructive of the relation which is generally understood to exist between client and counsel, could scarcely have been suggested; and many of our readers may be startled to find, that the principle on which it rests has received the sanction of several of our ablest judges, Chief Baron Alexander, Lords Brougham, Lyndhurst, and Eldon.

A principle sheltered under such high authority is a formidable object of attack; and, indeed, it could hardly have been approached, if we supposed that these eminent lawyers had decided upon it with their judgments unfettered. But we can satisfy our readers that this is not the case. It is very true that they have enforced the principle; yet we can show from their own expressions that they enforced it only upon the supposition that it was previously decided, and that several of them have recognized it with extreme reluctance. The case, in which the point is supposed to have been decided, is *Radcliffe v. Fursman*. Sir John Leach,³ in speaking of it says, "The case in the House

¹ 3 Sim. 467; 1 M. & K. 88.² Walker v. Wildman, 6 Mad. 47. 1821.³ 2 Bro. P. C. 514. 1730.

of Lords, where the client was ordered to produce a case stated for the opinion of counsel, has been followed in *spécie* but not in principle." We have been informed by some gentlemen who constantly practised in his Court, that he always treated it as very objectionable; and frequently said, that, except in circumstances precisely similar, he would not follow it. *Bolton v. Corporation of Liverpool*¹ is one of the most important cases upon the subject. The present Lord Chief Baron, in speaking of that case, says, "I own I think that case went too far. Communications of that nature are strictly privileged."² And again; "It is disagreeable to be called upon to review the decisions of eminent persons, but if I am bound to give an opinion, I must say that the order to produce confidential communications in respect to matters of fact, relating to a party's title, have proceeded upon a principle which it is not necessary to extend. Many of the cases which have been cited for the plaintiff do not go the length contended for; certainly not the case in *Vesey*, because there both parties were interested directly in the motion; and under such circumstances, that case and others have established a precedent which we cannot overcome. As to the decision of Lord Brougham and the Vice-Chancellor, I should say, that the statement for counsel which they ordered to be produced was as much protected as that which they refused."³ He also says, "I had an opportunity of investigating the authorities on which that decision was made, and I found that they were all cases in which the party seeking the production had a direct interest in the documents sought for." Lord Abinger is an authority of peculiar weight upon this subject, for he was the counsel principally consulted in the common law proceedings between the Corporation of Liverpool and Mr. Bolton. After the Vice-Chancellor had decided that the cases should be produced, "the defendants," says Lord Abinger, "by my advice appealed from that decision to Lord Brougham."

We shall follow the course adopted by Lord Abinger, and investigate the original authority upon the question. By doing so, he came to the conclusion, that the plaintiff has a right to the production of the case, if it supports his title. We hope

¹ 3 Sim. 467; 1 M. & K. 88.

³ Ibid. 40.

² *Knight v. Waterford*, 2 Y. & C. 39. 1836.

to induce our readers to draw a still stronger inference; namely, that the old authority has no weight at all upon the general question, and can be correctly quoted only in cases in which the defendant occupies the character of trustee for the plaintiff, or perhaps if he is attorney, or in any way fills the capacity of agent.

Our *first* proposition will be, that *Radcliffe v. Fursman* is no authority for the application of the principle to cases in general.

Our *second*, that in subsequent cases the judges have not expressed their own opinion, but have considered themselves bound by *Radcliffe v. Fursman*.

Our *third*, that the principle is quite inconsistent with certain rules of evidence which are firmly established.

Our *fourth*, that upon general reasoning it ought not to be adopted.

We really can offer no apology for inviting our readers to a detailed investigation of this question. It is vitally important not merely to the members of our profession, but also to every person who may ever be in any way concerned in legal proceedings. The evil has already gone so far, that counsel have sometimes recommended their clients to make no statement upon paper, or to destroy their statement as soon as the opinion upon it has been received. If, then, we are correct in stating that the rule now in operation is vicious in principle, and rests upon a mistaken conception of an old case, the more thoroughly the matter is sifted, and the sooner a resistance is offered to the enforcement of the principle, the profession and the public will gain the greater benefit.

First, then, that *Radcliffe v. Fursman* is no authority for the application of the principle to cases in general. It appeared in that case that Jasper Radcliffe, father of Walter Radcliffe, the appellant, executed two bonds in which Martha Mannaton took the beneficial interest. Jasper Radcliffe, at his death, devised real estates to two trustees for a term of 500 years, in trust for the payment of his just debts, and made Jasper Radcliffe, his son, executor and residuary legatee. Events happened by which Martha Fursman, the respondent, became entitled to the beneficial interest in the bonds, and Walter Radcliffe, the appellant, to the term of 500 years, as trustee,

and subject to this trust, to the real and personal estate of Jasper Radcliffe, his father. So that the relation which subsisted between him and Martha Fursman was that of trustee and cestui que trust.

“ Application being made to the appellant on behalf of the respondent for payment of the said legacy and bonds, and he having refused to pay the same, a bill was in Easter term, 1729, exhibited against him in the Court of Chancery, in the name of the respondent, by her next friend, to compel him to pay the same.

This bill charged that the appellant well knew or believed that these bonds were never paid; and as a demonstration thereof, that the appellant himself, or some person on his behalf, so declared or stated in some case for the opinion of some counsel; but to conceal the truth of such case, he stated the same by way of A., B., and C., and other letters; and in particular stated, that A. B. (innuendo the said Jasper Radcliffe, the father,) died about four years after giving two bonds, (innuendo the said two bonds,) without payment thereof; and further stated, that the eldest son of the said A. B. died about seven years after his father, without paying any part of the principal or interest due on the said bonds; and then consulted whether length of time would not prejudice the respondent's right to the said bonds. The bill, therefore, required a particular discovery of these facts, and that the said case might be set forth in hæc verba et literas.

To so much of this bill, as required the appellant to set forth in hæc verba et literas the said case stated by him for the opinion of counsel, or to what counsel such case was stated, or what opinion was given thereon, he demurred; alleging for cause, that the plaintiff was not entitled to any such discovery, and that the opinion was taken for the appellant's own private use and satisfaction.

The demurrer being argued before the Lord Chancellor King on the 3d of March, 1729, his lordship was pleased to overrule the same as to setting forth the said case, but to allow it as to all other matters.

The appellant, therefore, appealed from so much of this order as overruled the first part of his demurrer.

Amongst the arguments for the respondent, it was said,

That the state of the said case was in a matter where the appellant was not merely concerned in his own right, but as a trustee of the bonds for the respondent, and a trustee also of the estates liable to the payment of them; and, besides, no inconvenience could possibly arise to him from making such discovery, but paying the bonds, upon its appearing that they were really due. The order complained of in the appeal was affirmed."

It appears upon this statement that, in respect of the term of years which was in the possession of Radcliffe, he occupied two characters. So far as Mrs. Fursman was concerned, he was trustee; after the satisfaction of her claims, he had the beneficial interest. Yet, until he showed that the trust had expired, he was to be viewed by the Court in his capacity of trustee. Had he pleaded the statute of limitations, or any other matter negating the existence of the trust, the authority would have been entirely different; but the course which he adopted was to demur, and coming before the Court still in his character of trustee, to argue that the case was protected as a privileged communication. It seems then, to us, that the reason, why Radcliffe was obliged to produce the case, was founded not upon any general right which a plaintiff has against a defendant, but upon the specific relation which subsists between cestui que trust and trustee; upon the duty of the trustee to take every possible step for the benefit of the cestui que trust; upon the equitable presumption that every step which he takes is taken with that view; and upon the obligation which naturally ensues, to discover to the cestui que trust every act which he has done in respect of the property in trust. As this appears to us to be the gist of the whole question, we shall enter somewhat more at length into the duty of a trustee towards his cestui que trust.

It is very difficult for a trustee to obtain a beneficial interest in his trust property. His purchase of it seems¹ to be not absolutely void, but is always liable to be opened, if a more advantageous sale could have possibly been made. Lord Eldon² says "that a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascer-

¹ Campbell v. Walker, 5 Ves. 680. 1800.

² Cohen v. Trecothick, 9 Ves. 247. 1804.

tained to be such after a jealous and scrupulous examination of all the circumstances, proving that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee."—"If an adventitious advantage accrued, yet if the party had not divested himself of the character of trustee by an unqualified authorized contract to buy, the cestui que trust is entitled to the most casual advantage that might arise." "The principle," said Lord Manners,¹ "to be extracted from all the authorities amounts to this, that whenever a mortgagee, executor, or trustee or tenant for life gets an advantage by either being in possession or behind the back of the party mortgagor, cestui que trust, or remainder-man, he shall not retain the same for his own benefit, *but hold it in trust*." "The principle," said Lord Eldon,² "is, that as the trustee is bound by his duty to acquire all the *knowledge* possible to enable him to sell to the utmost advantage for the cestui que trust, the question, what knowledge he has obtained, and whether he has fairly given the benefit of that knowledge to the cestui que trust, which he always acquires at the expense of the cestui que trust, no Court can discuss with competent sufficiency, or with safety to the parties." In *Cane v. Allen*,³ Lord Eldon said, "The general rule that a trustee to sell could not purchase the trust estate was now pretty well settled." In *Whichcote v. Lawrence*, Lord Loughborough said, "It is obvious that this estate has not been sold to that advantage which the knowledge and abilities of the trustee, exerted towards this estate, when his own, obtained for himself; and if that knowledge and ability had been applied at the original sale, when the estate was sold for the benefit of the creditors, it is obvious it would have been more beneficial to the creditors than the result of that sale, which, with the concurrence of the trustees, the defendant permitted, and at which he became the purchaser." "It is stated⁴ as a proposition, that a trustee cannot buy of the cestui que trust. Certainly that naked proposition is not correctly true: but an emanation from that which prevails

¹ *Nesbitt v. Tredennick*, 2 B. & B. 47. 1808.

² *Ex parte James*, 8 Ves. 348. 1803.

³ 2 Dow. P. C. 300. 1814.

⁴ *Whichcote v. Lawrence*, 3 Ves. 750. 1798.

in all cases, in all laws and countries where trusts are admitted; led to great discussion in M'Enzie's case to prove, that the sale, where the trustee to sell is the purchaser, is *ipso jure nihil*; that there is no sale, no contracting party. That is not the real sense of the proposition: but it is this, which is very plain in point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter, shall not in the same matter act for himself." And again, he says, in *Campbell v. Walker*, "The reason of the rule is, that no man shall sell to himself."

Our object in quoting these passages has been to show the intimate relation which Courts of Equity suppose to subsist between the trustees and *cestui que trust*. All that the trustees possess or know with reference to the trust property, they possess or know for the benefit of the *cestui que trust*. If they make a profit of it, they are accountable to him; if they apply their abilities to the improvement of it, the Court presumes that they have done so for his benefit. Trustee and *cestui que trust* resemble parts of one and the same person; distinguished, however, upon a somewhat unfair principle, viz. that the trustee indures all the labour, of which the *cestui que trust* takes all the fruit. The trustee may make much the same complaint as the members of the physical body in the well-known fable of Menenius Agrippa, "*indignatas reliquas partes suâ curâ, suo labore ac ministerio ventri omnia quæri: ventrem, in medio quietum nihil aliud, quàm datis voluptatibus frui.*" And he may look with envy at the plaintiffs in the fable, who enjoyed a reciprocity to which he is altogether a stranger—"Inde apparuisse, ventris quoque haud segne ministerium esse: nec magis ali, quàm alere eum reddentem in omnes corporis partes hunc, quo vivimus vigemusque, divisum paritèr in venis maturum, confecto cibo, sanguinem."¹

Bearing in mind, then, this indentity of interest and person which subsists between trustee and *cestui que trust*, we return to the consideration of *Radcliffe v. Fursman*. The case prepared for counsel contained information respecting the trust property. The trustee was bound to use it for the benefit of the *cestui que trust*. He was to be considered as acting for

¹ *Livy*, lib. ii. 32.

his cestui que trust, and not for himself, in laying the case before the counsel. If a doubt existed respecting the continuation of the trust interest, his duty was to bring that doubt to a decision; but until the termination of the trust interest had taken place, the Court would not regard him as acting adversely to the cestui que trust. Not merely was the case stated, but moreover the opinion was obtained for his benefit, and according to our notions both one and the other might have been required by a bill of discovery.¹ If the trustee could be viewed in a separate capacity, there would be that same conflict between interest and duty which, in the opinion of Lord Manners,² rendered it impossible for a principal to have dealings with his agent. If the question put to counsel had concerned the sale of the trust property, the cestui que trust being entitled to the benefit arising from the sale, could not have been refused a sight of the opinion taken in preparation for it. Nor can the fact, that the inquiry was made from counsel with a view to establish a right adverse to the cestui que trust, make any difference, for the Court will not view the trustee according to his pleasure, sometimes as acting for himself, sometimes for his cestui que trust. "The Court³ will look with great jealousy on the conduct of trustees: and where a person has the arrangement and management of two estates, in one of which he is interested personally, in the other as trustee, the Court will not allow him to act for his own or the infant's benefit as he pleases."

Brown's Parliamentary Cases are reported in such a form, that the grounds upon which they were decided can never be positively ascertained. However, it is not a mere conjecture of our own, that the decision in this case proceeded exclusively upon the defendant's character as trustee. Lord Eldon particularly alludes to this point in *Richards v. Jackson*, and in the part of the argument of the case itself which has been already quoted, it is laid down as one of the grounds upon which the respondent relied.⁴

¹ As in *Attorney-General v. Berkeley*, where the opinion was asked for the benefit of both parties, 2 J. & W. 291. 1820.

² *Dunbar v. Tredennick*, 2 B. & B. 322. 1813.

³ *Wilkinson v. Stafford*, 1 Ves. 43. 1789.

⁴ In concluding our remarks upon this case it is right to add the further doubts which have been suggested respecting it. "*Radcliffe v. Fursman* is the case com-

We now venture to express a hope that our first proposition is established. A rule may be applicable between trustee and cestui que trust, and yet wholly inapplicable between any other parties. We have shown how intimate is the privity between such persons, and that such privity was made matter of observation in the argument: it will, we think, be admitted, that Lord King and the other lawyers in the House of Lords may have compelled the trustee to produce the cases in his possession, without entertaining any notion that there would be founded upon their judgment a claim by every plaintiff to see all the cases relating to any question at issue which a defendant may have laid before counsel.¹

Our second proposition is, that in subsequent cases the judges considered themselves bound by *Radcliffe v. Fursman*.

In *Richards v. Jackson*,² Lord Eldon says, "If that case in the House of Lords turned upon the peculiarity, that the defendant was trustee of the bonds, a similar specialty is not wanting in the present case. There is so much objection to breaking in upon the confidence between counsel or solicitor and client, that, *if it were res integra*, I should be inclined not to indulge such an inquiry: but I am bound by authority to overrule this demurrer, which covers too much: the bill having sufficient allegation of facts contained in these cases, and

monly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in *Brown's Parliamentary Cases* is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted, or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the Court had no right to know any thing which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time in order to satisfy the party consulting, whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted appears to have been, the mischief of disclosing statements confidentially made for the private use and satisfaction of parties."—Per Lord Brougham in *Bolton v. Corporation of Liverpool*.

¹ *Stanhope v. Roberts* has been mentioned as an authority upon this question; but decidedly it does not apply, as the counsel, whose privilege was there raised as a ground for objecting to produce the papers, was an interested party, and as such bound to produce them; 2 Atk. 214.

² 18 Ves. 474. 1812.

opinions material to the plaintiff's case, to the discovery of which he is entitled."

In *Preston v. Carr*,¹ Lord Chief Baron Alexander ordered the production of the case, and Baron Garrow said, "I concur with the Lord Chief Baron, on the authority of the case in the House of Lords, that the plaintiff is entitled to the production of the first case, and to the facts of the second. I say *on the authority of that case*; for I should certainly feel inclined to go with those who have expressed an opinion, that that case ought not to be carried any further." The view of the subject taken by Sir John Leach has been already mentioned.

In *Newton v. Berresford*,² Lord Lyndhurst, speaking of cases for counsel's opinion says, "With respect to them, *the question seems now to be settled*, it having been repeatedly decided under similar circumstances, that a defendant is bound to produce such documents."

In *Bolton v. the Corporation of Liverpool*,³ Sir Lancelot Shadwell does not specifically mention *Radcliffe v. Fursman*, but we have understood that he treated the question as one so completely decided, as not to leave him the exercise of any discretion. Lord Brougham observed, in giving judgment upon the appeal,⁴ "Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, *if the authorities are in its favour, we must submit*."

In *Knight v. Waterford*,⁵ Lord Abinger said, "I do not think it material whether such communications relate to a cause now in progress, or to matters which took place on former occasions. In *Bolton v. Corporation of Liverpool*, Lord Brougham was, I believe, of that opinion,⁶ but thought himself bound by the authorities to adhere to the distinction." Lord Abinger's own view of the law is taken entirely from the previous decisions. He particularly says that he has consulted them, and adopted the principle which he believes to prevail in them.

¹ 1 Y. & J. 179. 1826.

⁴ 1 M. & K. 95. 1833.

² 1 Younge, 378.

⁵ 2 Younge, 38. 1836.

³ 3 Sim. 487. 1831.

⁶ Lord Brougham, speaking of such disclosures, says, "they can only be justified if the authority of decided cases warrants it."

It is impossible to look through this series of authorities without observing that they do not contain any approbation of the rule, even by any one of the judges who enforced it; but, on the contrary, expressions of undisguised disapprobation by Lords Eldon, Brougham, and Abinger. Lord Abinger puts a limit upon it according to the view which he takes of the original case, and appears to doubt the correctness of it even after this reduction of its force. Is it not a fair inference, that if he had taken the same view of that case which we have offered for consideration, he would have limited the rule still further to cases of an exactly similar kind; that is, to cases between trustee and cestui que trust, or between principal and agent, or to any other cases of the same complexion? And are not we justified in presuming, that if the next case which is submitted to a Court of Equity shall be heard by a judge who construes with a like strictness the decision in *Radcliffe v. Fursman*, he will feel himself at liberty to limit the rule still further, and to enforce the secret confidence between client and counsel as strictly as the general principles of law, and the relation borne by the two parties to one another, may seem to require? It is under the impression that these two questions must be answered in the affirmative that we proceed to investigate our remaining propositions. They will guide us to the conclusion which a judge may be induced to make under the circumstances which we have just supposed.

Third.—That the principle is quite inconsistent with certain rules of evidence which are universally acknowledged.

It will, perhaps, be convenient, if we mention the precise point, which we shall endeavour to establish. There is no necessity for contending that cases laid before counsel, with reference to suits in progress, are privileged. Upon that point there is no doubt. Nor that such cases are privileged, if the matter contained in them relates exclusively to the defendant's title. Upon that point the decision in *Knight v. Waterford* will probably be held conclusive. On the other hand, we claim no privilege for defendants who are not in their character independent of the plaintiff; that is, if they are agents or trustees, if their position is such that in every thing which they say or do they are bound to pursue the benefit of the plaintiff. Again, we do not claim a privilege for any information which is not

communicated in professional confidence; ¹ "the moment confidence ceases, privilege ceases." ² "If any thing come to the defendant's knowledge before he was a counsellor, or upon any other account, he shall not have the privilege of the bar, and is obliged to answer." ³ "The protection does not extend to cases where the counsel, attorney, or solicitor, is employed in matters not professional—as in a treaty for the purchase of an estate." ⁴ But we contend that if a defendant, who is in respect of the plaintiff *sui juris*, and not accountable to him with reference to the matter in question, has made a statement to a solicitor or counsel for professional purposes, that statement, although made long ago, and not with any view to a suit now in progress, should be treated as a privileged communication.

It was ruled in *Bulstrode v. Letchmere*,⁵ upon a demurrer to a bill exhibited for the discovery of deeds in the defendant's possession, and of the contents of other deeds which he had seen of Mr. Dingley's estate, that the defendant, being a counsellor at law, shall not be bound to answer concerning any writings which he hath seen, nor for any thing which he knoweth in the cause as counsellor. "This doctrine of privilege," says Mr. Justice Buller,⁵ "was fully discussed in a case before Lord Hardwicke. The privilege is confined to the cases of counsel, solicitor, and attorney." "It is subject of a just indignation, where persons are anxious to reveal what has been communicated to them in a confidential manner; and in the case mentioned, where Reynolds, who had formerly been the attorney of Mr. Petrie, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject, while he was concerned as the attorney, I strongly animadverted on his conduct, and would not suffer him to be examined: he had acquired his knowledge during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privi-

¹ See cases upon this subject collected in 2 *Star. on Evid.* 230.

² *Parkhurst v. Lowten*, 2 *Swan*. 216. 1819.

³ *Bulstrode v. Letchmere*, 2 *Freem.* 5. 1676.

⁴ *Walker v. Wildman*, 6 *Mad.* 47. 1821. Per Sir J. Leach.

⁵ *Wilson v. Rastall*, 4 *T. R.* 759. 1792. See *Cromack v. Heathcote*, 2 *Brod. & B.* 5. 1820.

lege of the party, and not of the attorney; and that that privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; *the mouth of such a person is shut for ever*. I take the distinction to be now well settled, that the privilege extends to those three enumerated cases *at all times*, but that it is confined to these cases only." Sir J. Leach¹ held the protection to extend not merely to communications made pending an action or suit, but to every communication made by the client to counsel or attorney, or solicitor, for professional assistance. A motion² to compel an attorney to produce papers of his client has been refused with costs. "No counsel, attorney, or solicitor," says Lord Eldon, "ought to betray the secrets of his client."³ The depositions⁴ of an attorney have been suppressed as to all such matter as came to his knowledge in his character of attorney. Lord Hardwicke thought that the privilege extended to a conveyancer.⁵ In *Greenough v. Gaskell*,⁶ a motion was made that a solicitor, defendant in the suit, should produce certain papers and letters written or received by him in his capacity of confidential solicitor. Lord Brougham reviewed many of the principal decisions upon the subject; those⁷ in which the privilege has been allowed, and those⁸ in which it has been refused, commented upon several of the cases which have been already mentioned, and decided that a solicitor cannot be compelled to disclose papers delivered, or communications made to him, or letters or entries made by him in that capacity.

In considering the effect of these cases, it must be borne in

¹ *Walker v. Wildman*, 6 Mad. 47. 1821.

² *Wright v. Mayer*, 6 Ves. 281. 1801.

³ *Winchester v. Fournier*, 2 Ves. 447. 1752.

⁴ *Sandford v. Remington*, 2 Ves. 189. 1793.

⁵ *South Sea Company v. Dolliffe*, quoted in 2 Atk. 525. See *Gresley on Evidence*, p. 280.

⁶ 1 M. & K. 100. 1833.

⁷ *Anon. Skinner*, 404; *Gainsford v. Gramner*, 2 Campb. 9; *Harvey v. Clayton*, 2 Swan. 221, n.; *Robson v. Kemp*, 5 Esp. 52; *Brand v. Ackerman*, 5 Esp. 119.

⁸ *Cuts v. Pickering*, 1 Ventr. 197; *Lord Say's case*, 10 Mod. 40; *Studdy v. Sanders*, 2 Dow. & Ry. 347; *Rex v. Watkinson*, 2 Strange, 1122; *Doe v. Andrews*, Cowp. 845; *Cobden v. Kendrick*, 4 T. R. 431; *Duffin v. Smith*, Peake, 108; *Clark v. Clark*, 2 Moo. & M. 3; *Williams v. Mundie*, Ry. & Moo. 34; *Broad v. Pitt*, 1 Moo. & M. 234; *Bramwell v. Lucas*, 2 B. & C. 745.

mind, "that the rules¹ of evidence are the same on both sides of the Hall," and therefore that weight may be allowed to cases at common law, as well as to cases in equity, for the decision of the rights of parties in respect of discovery. The cases show, that professional men can in no way be examined upon the matter disclosed to them by their clients for professional purposes; and that, whether the matter does or does not relate to a suit still in progress. Moreover, that this secrecy is enforced for the client's benefit. The disclosure must not be made by the counsel, because it would injure him. It follows, by an almost necessary consequence, that it ought not to be required from the client himself. One distinction may possibly be suggested, namely, that the counsel's mouth is shut, in order that he may not have his client at his mercy; while, on the other hand, there is no chance of the client's misrepresenting his own case. We mention the distinction without attributing to it any weight, for if it had been in contemplation, it must have appeared in some of the reported cases, and before this time would probably have caused an attempt to examine the client himself as to the statement made in consultation. The distinction would give rise to this anomaly, which our law always strives to avoid, that of different persons present during a transaction, one may give any false account of it he pleases, and the other must not disclose the truth. The arguments used in the courts have been uniformly of one and the same kind, namely, that the privilege exists for the client's benefit, and applies to the thing communicated, without reference to the particular person, of whom the question is asked. If the client² chooses to waive the privilege, the counsel may be subject to examination and cross-examination. It is clear that Lord Abinger regards it as a matter of indifference whether client or counsel is the person examined: "The privileges of the solicitor," he says,³ "would be worth nothing, if you could file a bill against the client, and make him discover what the solicitor cannot." If, then, that is the

¹ *Greenough v. Gaskell*, ub. sup.

² *2 Stark. on Evid.* 231.

³ *Knight v. Waterford*, 3 Y. & J. 40, 1836.

principle of a long series of decisions made in courts of equity as well as of law, upon motions to produce papers, and upon attempts to examine *vivâ voce*, or by interrogatories, it must apply to statements made upon paper, as well as to those made *vivâ voce*, and to the client who speaks or writes, as well as to counsel or attorney who reads or listens.

Mr. Hare, in his work on *Discovery*, has collected all the cases upon this subject, and digested them with great accuracy. He introduces a remark, fairly inferred from them, which, compared with the dictum of Lord Abinger, just quoted, shows in a clear point of view the inconsistent, we venture to say, the absurd state of the law. "In a court of equity," writes Mr. Hare, "as against the party himself, a discovery may be compelled of matters, with regard to which the attorney examined as a witness, would not be obliged to answer;"¹ the very power which, according to Lord Abinger's dictum, would render the privilege worth nothing.

In considering the kind of cases in which the question arises, we shall find that in other respects the rule now prevailing is at variance with received principles of law. It is quite clear, that the cases, of which a disclosure is prayed, must be connected with the question at issue in the suit. It must have been stated, either by the defendant himself, or by some person, to whose position the defendant has succeeded, and by whose statements he is therefore bound. It must amount therefore to information possessed by the defendant, and bearing upon the point at issue. In other words, it must be matter, which the defendant would naturally lay before his counsel—in reality a part of the counsel's brief. Whether the case was drawn up recently or long ago, cannot in this respect make any kind of difference. Nor can we understand the distinction between cases drawn up with a reference to a suit still in progress, or for any other purpose. The following remarks of Lord Brougham seem to apply to all such cases as contain matter to be inserted in the brief for counsel; and we venture to say that the production of any case, not containing matter of this description, may be objected to as

¹ Hare on *Discovery*, 174.

being irrelevant to the question at issue. Lord Brougham is speaking of cases "prepared in contemplation of and with reference to the suit." "It seems plain,¹ that the course of justice must stop, if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence, may and often does contain the whole of his evidence, and may be and frequently is the brief with which that or some other counsel conducts the cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into court to try the cause; and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial and obtain a discovery of those new circumstances, which in all likelihood had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection without the party informing any one of his case except his legal advisers. But without such communication, no person can safely come into a court either to obtain redress or to defend himself."

The view of the question, which we take, may in a great degree be aided by the answer given to an argument which must of course be encountered, that if the courts refuse access to cases, they deprive the plaintiff of one means of ascertaining the truth. If this argument were carried to its utmost extent, it would overthrow a great deal of law thoroughly established. Privy councillors must be subject to examination, no agent of government must be permitted to keep

¹ *Bolton v. Corporation of Liverpool*, 1 M. & K. 94, 1833.

secrets, wives must give evidence against their husbands, the grand juryman's oath must be held no longer binding; and, as a general rule, the removal of all protection must always take place when it is required by the circumstances of the plaintiff. On the same ground, the plaintiff's case must not be distinguished from the defendant's; statements with reference to a suit, made even during its pendency, must be revealed; in short, a copy of the defendant's brief must be found in the plaintiff's bag.

Suppose that the argument is not pressed to its full extent, it amounts merely to this, that for truth's sake every thing must be disclosed of which the disclosure will produce a greater benefit than its concealment. To this doctrine we are ready to assent. In order to apply it, let the benefit of the existing rule be fairly appreciated. If the statement contained in a case, of which disclosure is prayed, happens to be inconvenient to the defendant, he will put it into the fire. No law forbids him to do so. Then he will be required to state the contents of the case from memory. But here the advantage of the rule is entirely lost. It would always be possible by interrogatories framed upon the general rules of discovery, to gain as much advantage as would be obtained by such a question—subject to this restriction, that an interrogatory would be demurrable concerning matter which touched the defendant's and not the plaintiff's title. The advantage of the existing rule will generally amount only to this, that the defendant may, by the evidence of the case produced, be convicted of falsehood. Of course, this advantage is lost, when the case may be put into the fire. In truth, the rule will produce no very detrimental effect to the defendant, unless it is made penal to destroy a document, which a person has drawn exclusively for his own use, and has at his own expense laid before his own counsel. As these are not the days of either Judge Jeffries or the Inquisition, we do not fear the establishment of such a rule.

These considerations bring us to our *fourth* proposition, which is, that upon general reasoning the rule ought not to be followed. With reference to the discovery of truth, it will not merely be negative in its consequences, as producing no benefit, but will even supply an easy means of deception. It will

be easy for a defendant, in anticipation of a suit, to state a case containing falsehoods, which, at the proper moment, may turn greatly to his advantage. The contrivance will be aided by the privilege of making the statement without the incumbrance of an oath; and when the case is produced it will entangle the plaintiff in new difficulties, arising from the violation of that admirable rule, that no man shall make evidence for himself.

The oath constitutes but one out of many material distinctions between interrogatories to a defendant as to what he knows, and the compulsory production of a case. The case probably contains matter material to the defendant's as well as to the plaintiff's title. Both kinds of matter are intermixed. One of them the plaintiff is, the other he is not entitled to know. In answering the interrogatories, the defendant has an opportunity of separating them from one another. To those of the first kind he demurs; he answers those of the second. He may suffer very grievous injury, if he is compelled to bring into court a case containing the answers to both kinds of interrogatories. It happens not unfrequently, that cases contain statements of facts which are not, but may be. Perhaps the client is uncertain upon a particular fact, but wishes to ascertain what will be his position, if it turns out to be the truth; a statement is drawn accordingly, in order that the counsel may give his opinion upon it. The event, though in truth problematical, is stated as having occurred; simply, however, with this view. Besides, the statement is frequently made by the attorney, and not by the client himself. If it is received in evidence, the client may be suffering because his attorney, either unintentionally or fraudulently, made a misrepresentation.

There are no limits to the difficulties of this kind which the rule is calculated to create: but the main objections are founded upon principles far more extensive in their application. One great object of our legal system is, that the rights of all persons shall be submitted with equal force to our courts of justice. "*Il faut des avocats pour rétablir l'égalité entre les parties sous le rapport de la capacité, et pour contrebalancer le désavantage attaché à l'infériorité de condition.*"¹

¹ De l'Organisation Judiciaire. Par M. Dumont, edit. 1828, p. 140.

Let a person be who he may, strong or weak, learned or unlearned, wise or foolish, a man of influence and invested with authority, or destitute of means and utterly helpless, his claims are equally to be laid before the judge with all the power of advocacy of which they are susceptible. To accomplish this object, the first indispensable requisite is, that the client shall state to his legal advisers *all* the facts of his case. Very few clients can perceive wherein their strength lies. They must state *the whole* to the legal adviser, and leave him to form his own judgment. By this means the balance is adjusted. The weakness of the client finds a compensation in his lawyer's strength: the looseness of thought, carelessness and inaccuracy of the one, in the precision and subtlety and judgment of the other; and thus every man's case is brought with nearly equal ability and chance of success under the consideration of the judge. But how will a client venture to lay before his counsel a statement of all the facts of his case, if that very statement may hereafter be evidence against him? There will be an end to equality, if one person has an advantage over another, because he is sufficiently cunning in the law to know what may, and what may not, be safely revealed to counsel. Such equality never can exist, unless client and counsel are completely identified, and their communications held to be as impervious to judicial investigation, as if they never had been uttered.¹

It is a received axiom, that every man knows the law. The axiom works but little injustice, because every man can ascertain the law by consulting a lawyer. But then the

¹ Many of our readers will recollect the passage in Mr. Bentham's work upon "judicial evidence," in which he maintains the propriety of compelling lawyers to disclose the secrets of their clients (edit. 1825, p. 246). In the note upon this passage is Mr. Dument's very pertinent remark: "Admit this opinion of Mr. Bentham, it is said, and the accused have no longer counsel; they are surrounded by agents of justice and the police, against whom they ought to be so much the more upon their guard, as no man of a noble or elevated mind would stoop to such an employment. They are so many spies and informers placed round the accused. This is to suppress the defence entirely. *The question ought to be examined in this new shape." One of the Edinburgh Reviewers has pointed out Mr. Bentham's mistake with signal ability, vol. 40, p. 183. The truth is, that Mr. Bentham took a very narrow view of the question. He was unacquainted with the practice of lawyers; and it seems that he did not understand the situation which they fill, or the duties which they are required to perform.

condition, upon which this power of ascertaining the law will rest, is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost extent, or it will not be made. Thus it will be one consequence of the rule, that the law will be in no way open to the community at large: to them it will be a sealed book; and this axiom, from which every decision, in a greater or less degree, derives its justification in point of morality, will work very grievous injury.

The present rule of law is calculated to work the greater evils, because the persons acquainted with it are so few. We doubt whether any one merchant in the city of London, in stating for the opinion of counsel the condition of his firm, anticipates the possibility of ever producing his statement in a court of justice: whether any one proprietor of land, stating the circumstances of his own acknowledged title, or of some possible adverse title, supposes that his statements can be ever subjected to the inspection of an adverse claimant; whether, in short, out of every hundred persons who consult counsel, ninety and nine do not write in perfect confidence that they write for the eye of counsel and of no one else, and that, however much they may be off their guard, their statement can do them no injury, as it can never be employed against them.

We may remark, that the evils, which we attribute to this rule as results flowing from it, are merely those which it has a tendency to produce. They are of such a nature, that it lies out of our power to show how frequently they actually have occurred. We cannot tell how often a fear of discovery has deterred a person from seeking legal advice, or from preserving useful papers, or from revealing the entire facts of his case. The very nature of these events renders it improbable that they should often come to light. Our readers will judge whether we point out the tendency of the rule correctly, and if we do, will, we hope, concur with us in condemning it. The universal ignorance of this rule of law, by which it seems to us to be increased in danger, has of course diminished the number of instances in which many of the consequences which we apprehend from it have occurred.

We would ask whether the advocates of this rule have

seriously considered the fearful relation which it will create between a lawyer and his client. We are not so utopian as to suppose that, in the long lists of our profession, names will not be found of lawyers treacherous to their clients, of men who—"Scire volunt secreta domus atque inde timeri." Such lawyers, if this rule is to prevail, will have their clients at their mercy, and may at any moment contrive their ruin. A learned judge well asked, on one occasion,¹ "Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw?" And yet, if that defect arises from a birth, or a death, or from some other event, upon which the title of an adverse claimant has any dependence, the attorney, upon the principle of this obnoxious rule, will not merely be at liberty, but will even be compelled to divulge the flaw. It could hardly have been expected that, in the same country in which the mere mention of a registration of title raised up such a host of imaginary fears, a law should be recognized by which every proprietor of land is at once subjected to the disclosures of his attorney.

We write under a conviction that in this question we all have a most important interest. It is no slight requital for the labours and anxieties of a lawyer in practice, no small encouragement to the increase of his efforts, that he finds in his client unlimited confidence. The dull routine of ordinary practice is sometimes broken by a case in which great interests are to be supported, important rights to be maintained, and schemes of fraud and injustice to be unravelled and thwarted. It is on occasions of this kind that a lawyer rises above the feelings of an ordinary practitioner, and in the consciousness of the trust reposed in him, and of the faith entertained in his abilities and honour, becomes sensible of the nobler and more generous attributes which belong to his profession. He² feels that he is a guardian of the weak, and adviser of the ignorant, and that he may rejoice in the power

¹ *Cromack v. Heathcote*, 2 Brod. & B. 6. 1820.

² "Quand un avocat veut peindre en beau sa profession, que fait-il? Il trace le portrait d'un juge, et met au bas son propre nom; il se représente comme le défenseur de l'innocence opprimée, le conseil de la justice, le réparateur des torts, l'appui des orphelins."—*M. Dumont sur l'Organisation Judiciaire*, p. 166.

of protecting the oppressed, as a reward for many a weary hour of toil and disappointment. But if the intercourse with his client is not to be privileged; if the statement made for his information may be brought to light; still more, if he himself is to be witness against his client, confidence will cease, respect for the protector will be absorbed in dread of the witness, and the shades of suspicion will obscure the gleam of sunshine which might have enlivened and cheered his professional studies.

The rule, too, will be no slight aggravation of the client's distress. When a tradesman falls into difficulties, or a landowner is sinking beneath the accumulated incumbrances of his property, the greatest relief which he can obtain, greater often than the sympathy of an unprofessional friend, is the privilege of communicating his distresses to his legal adviser, of discussing their nature in unreserved confidence with him, and of thus ascertaining the means of redress. *Est enim sine dubio jurisconsulti domus totius oraculum civitatis.*¹ The rule of which we complain destroys the privilege of this sanctuary. This further embarrassment is thrust upon a person almost overwhelmed already, that being himself ignorant of the law, he dares not mention his case to one who might inform him, for fear of creating evidence against himself.

Our limits confine us to only one more argument bearing upon the subject before us. Mr. Preston once said, that out of thirty questions submitted for his consideration, not more than one found its way into a court of justice. Indeed, the adjustment of disputes by the opinion of counsel takes place so far more frequently than by a suit or trial, that it may be said to form in this country the practical administration of civil justice. Now neither we nor our readers are likely to be led away by the common complaints of the law's delay, or by the ordinary declamation against lawyers. We know that, generally speaking, men have themselves to thank for the miseries of litigation, from which they might almost be exempt, if they were not guilty of negligence or fraud, or of certain other habits and propensities, more or less vicious.

¹ Cic. de Orat.

Still every attempt should be made to apply the least painful remedy to the evils which proceed from these mischievous faults. A lawsuit should always be avoided when justice can be obtained without it. It is in the private chamber that the lawyer exercises his most useful functions: explains rights with the smallest expense, shortens the period of anxious expectation, and arrests in its commencement an evil, which at every step of its progress grows pregnant with augmented sufferings. It is there that he best serves the cause of humanity by alleviating most effectually the distress of his fellow-creatures. It is there that he fills the character of a friend, who is able and willing to point out the best course of action under the most trying circumstances. "The greatest trust," says Lord Bacon, "between men and men, is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors they commit the whole, by how much the more they are obliged to all faith and integrity." The condition upon which alone this counsel can be given requires particular attention. The lawyer must have the *whole* of his client's case, or he cannot pretend to give any useful advice. Upon a partial statement of facts he may judge correctly, and yet give his opinion in favour of a claim, which, if he had known all the circumstances, he would have perceived to be unjust, and which a court of justice upon full investigation at once overthrows. That the whole will not be told to counsel unless the privilege is confidential, is perfectly clear. A man who seeks advice, seeks it because he believes that he may do so safely; he will rarely make disclosures which may be used against him; rather than create an adverse witness in his lawyer, he will refuse all private arbitration, and take the chance of a trial.

We submit, that any rule which tends to prevent the settlement of quarrels by such arbitration will work an enormous evil. Our judges ought to pause before they sanction the received rule upon the production of cases, which, as it interferes with the communication between client and counsel, renders it dangerous to adopt this course, so easy and so safe, so free from vexation, and satisfactory to all honourable minds.

We leave this subject with regret, for, having a strong sense of its importance, we fear that we have done little justice to it. But if we draw to it the attention of any active members of our profession, and induce them again to take it into their consideration, with a view to the propriety of arguing it once more in a court of equity, our object is accomplished.

C.

ART. IV.—CONSTRUCTION OF THE PRESCRIPTION ACT.

SINCE our former observations on this subject¹ were written, several cases have been decided on the construction and application of this important statute, the discussions and judgments in which, although hardly perhaps bearing upon the questions most difficult of solution which may arise on its several enactments, will materially have aided in the general interpretation of it; more particularly of the *fifth* section, which prescribes the mode of alleging in pleading the rights which are the subject of the act.

The first case decided subsequently to *Bright v. Walker*,² on which we commented in our former article, was that of the *Monmouthshire Canal Company v. Harford*, (1 Cro. Mee. & Ros. 614, and 5 Tyrw. 68.) There, in trespass for breaking and entering a close used as a railroad, the defendants pleaded (amongst other things) that the occupiers of the adjoining closes had for twenty years, *as of right* and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, &c. and laying down railroads over the plaintiff's railroad.—The replication to this plea traversed this claim of right in terms, and issue was joined thereon. Upon this issue, evidence was admitted of applications made by the defendants, within twenty years, for *leave* to put down railways across that of the plaintiffs. It was contended for the defendants, that the replication merely traversed

¹ L. M. vol. xiii. p. 156.

² We have heard it stated in the profession, (we cannot say on what authority,) that some of the judges are not altogether satisfied with the determination in *Bright v. Walker*.

the enjoyment in fact for twenty years without interruption, with which enjoyment the license and permission were (in the terms of sect. 5) "not inconsistent," and ought therefore, under the fifth section of the statute, to have been specially replied. But the Court considered that the defendants, in order to prove their plea, were bound to show an *uninterrupted rightful enjoyment* for the twenty years; and that the permission asked for and given showed that the occupiers of the closes did not enjoy the way *as of right*, and also that they did not enjoy it uninterruptedly. "Every time," said Lord Lyndhurst, "that the occupiers asked for leave, they admitted that the former license had expired, and that the continuance of the enjoyment was broken." This ruling, the correctness of which few lawyers, we think, will be disposed to impugn, has been confirmed by both the other Common Law Courts, in the cases of *Tickle v. Brown* (6 Nev. & Man. 230) and *Beasley v. Clarke* (2 Bingh. New Cases, 705). In the former case, the Lord Chief Justice, in delivering the judgment, after stating that the great difficulty arose from the introduction into the concluding paragraph of sect. 5, of the words "or any cause or matter of fact or of law, not inconsistent with the *simple fact of enjoyment*," in the enumeration of matters forbidden to be given in evidence under a general traverse of the *enjoyment as of right*,—observed upon it in the following words:—

"As by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the legislature used the words 'as of right' in such a sense as that a party confessing the enjoyment *as of right* for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing, and in the other any contract, &c. written or verbal. It follows that the words 'as of right' cannot be confined to an adverse right from all time, as far as evidence shows; for if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was had by contract—which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to an enjoyment under a strict legal right, for then 'a consent or agreement in writing,' *not under seal* (of which the second section speaks) could

not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words 'claiming right thereto,' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person *claiming* to use it, without danger of being treated as a trespasser, *as a matter of right*; whether strictly legal—by prescription or adverse user, or by deed conferring the right,—or though not strictly legal, yet lawful to the extent of excusing a trespass,—as by a consent or agreement in writing, not under seal, in case of an enjoyment for forty years, or by such writing, or by parol consent, agreement, contract, or license, in case of an enjoyment for twenty years. According to this view of the act, a license in writing must be *replied* to a plea of forty years' enjoyment, *if it cover the whole time*, and the same of a verbal license, in case of a plea of enjoyment for twenty years."

It was argued, however, that on this principle of construction, the conclusion ought to have been that *every leave given* (in case of permission repeatedly asked) ought to be replied, as being, *pro hac vice*, as much a consent or agreement as one which covered the whole twenty years. The Court met this argument by the same answer which was given to it in the Monmouthshire Canal Company v. Harford, viz. that the asking leave from time to time within the twenty years *breaks the continuity of enjoyment as of right*, being an admission that at that time the asker had no right.

The distinction in fact between this latter case and the Monmouthshire Canal Company v. Harford was, that in the one the evidence was merely of *permission asked*, in the other it was of an actual *agreement*, within the twenty years, to pay a sum of money for permission to use the way. Tickle v. Brown amounts, therefore, to a decision that, under sect. 5, an agreement need be specially pleaded only where it was entered into *before the commencement of the period of prescription*.¹

¹ There was also an issue joined on an allegation of interruption for a year, and acquiescence therein: and the Court intimated that the agreement might be evidence under this issue also, as showing that the cessation of user was not from voluntary abstinence, but by reason of want of right.

In *Beasley v. Clarke*, the judgment of the Court was pronounced to the same effect, but with more hesitation of opinion. "Whatever might have been our opinion," said the Chief Justice Tindal, "we think the interpretation which has been put upon this clause by the Court of King's Bench in the recent case of *Tickle & Brown*, *may* be held to be the construction to be put upon the statute." The defendant in this case having pleaded a user as of right, in one plea for forty, in the other for twenty years, the plaintiff had, in reply to the former claim, alleged the leave and license specially, while he met the latter only by the general traverse. So that had the Court come to a contrary conclusion, the record would have presented the inconsistency of a verdict in favour of the right as claimed for the longer period, but against it as claimed for the shorter.

In *Wright v. Williams* (1 Meeson & Welsby, 77 ; 1 Tyrwhitt & Granger, 375), one point in question was, whether, in a plea under the statute, it was sufficient to allege that the user had existed for forty (or twenty) years *before the commencement of the suit*, (in conformity with the express provision of the fourth section,) or whether it was not necessary to allege it to have been for forty years *before the act complained of*: and the inconveniences which would result from a strict adherence to the terms of sect. 4 were very forcibly and ingeniously pointed out in argument. The defendants might have been wrong-doers when the act was done, although when the suit was commenced the full period of prescription might have been completed. It was contrary to principle (it was urged) that an act at one time wrongful should be purged by a continuance of wrong, and that the mere omission to commence an action should make that right, which, if the action had been brought a day earlier, would have been without justification. If sect. 4 were construed strictly, no right could be established unless it were made the subject of an action. Again, if A., one week after 39 years had expired, interrupted B. in the exercise of a right, and, satisfied with B.'s acquiescence, brought no action against him, but B., before the year after the interruption was complete, but after the forty years had run, brought his action against A., B.'s title would be perfect, and he would have damages against A. for doing that which he was at the time entitled to ; inasmuch as the interruption, not having been ac-

quiesced in for a whole year, would be, according to the statute, no interruption at all. Or even further;—B. might assert his claim *every year*, and though A. as continually resisted it, if B. never suffered a full year to elapse between the interruption and the assertion of his claim, he might, after having perhaps committed thirty-nine trespasses, at the end of forty years perfect his title by bringing his action against A. The 2d and 6th sections were also referred to as conflicting with the strict construction of sect. 4; since the former declared that no claim should be defeated after an *actual enjoyment* for the *full period* of forty years, and, again, if the title were held perfect if forty years had expired before the commencement of the suit, (which must follow the act done,) a presumption was necessarily made from an user for a less period than forty years, in violation of the sixth section.

It was answered to these arguments, that if it were necessary to allege a user for forty years before the act complained of, since the statute supposes a series of acts extending over a period of forty years, the plaintiff might compel the defendant to prove a user before the first of the acts complained of, and so to extend his proof to a period far beyond forty years. The statute meant to make it necessary that a party should take care that forty years should not elapse before complaint was made, and if the action were not brought within that period from the first act done, then the statute presumed that a continuance of such acts were of right during the whole period—giving a right by relation back to the commencement of them. So, wherever there was an interruption, the party must take care that the period of a year elapsed between that interruption and the expiration of the forty years, or he must bring his action. And the Court assented to this view of the case: holding that the express and positive terms of the statute were incapable of being modified; that it intended to confer, after the periods of enjoyment mentioned in it, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance.

We may observe here, that it has been determined that the plea will be sufficient if it allege the user to have been for twenty, &c. years *before* (not saying *next before*) the com-

mencement of the suit; the statutable proof will equally be necessary to establish the right.¹

It was decided also, in the same case of *Wright v. Williams*, that a replication of a life estate to a plea of enjoyment for forty years, must show that the plaintiff was the party entitled to the reversion expectant on the determination of the life estate: the time of a tenancy for life, though excluded by sect. 7 from the computation of the twenty years absolutely, being by sect. 8 excluded from the computation of the forty years *conditionally* only—that is, provided the reversioner expectant on the determination of the life estate shall, within three years after such determination, resist the right. The statute allowed one person only to resist the right after the expiration of the forty years—namely, the reversioner; the plaintiff ought therefore to show that *he* was the party so entitled to resist. On this point *Bright v. Walker* was urged as an authority to show, that as the enjoyment must be *as of right against all*, in order to give title against any, and as the *reversioner* could not be bound until the expiration of the three years allowed him after the determination of the life estate, the enjoyment, not being as of right against *him*, conferred no title even as against a stranger. And if the principles of decision laid down in *Bright v. Walker* are to be strictly carried out, this argument certainly appears to us not easily to admit of answer.

There can be little doubt, notwithstanding the points already decided, that the obscurities of this act of parliament will continue for some time to furnish occupation to the Courts of Law.

W.

¹ *Jones v. Price*, 3 Bingham N. C. 52.

ART. V.—THE RECORD COMMISSION.

1. *Report from the Select Committee on Record Commission, together with the Minutes of Evidence, Appendix and Index.* Ordered by the House of Commons to be printed, 15th August, 1836.
2. *Proceedings of the Record Commissioners (or Agenda) from June, 1832, to August, 1833.* Folio. Only fifty copies printed. In the library of the British Museum.
3. *Octavo edition of the Report, with Notes.* Published by Ridgway & Sons.

THE principal object of keeping the public records, in which term we include all the authentic certificates of legislative, legal, and executive proceedings, is their professed subser-
vency to the administration of justice. The utility they possess as furnishing the best materials for history, though of great importance, is rather a subordinate and accidental attribute. The immediate value and purpose of records at the time of their compilation is exclusively legal; but this value declines with their age, and afterwards assumes a character solely historical.

Thus, with the earliest public records;—a charter of King John may by possibility settle a dispute respecting a market or fair; but the majority of his mandates, like his writ to Hugh de Neville, commanding him to proclaim that whosoever should “do any harm to or speak evil of religious men or “clerks, if caught, should be hung on the nearest oak,”¹ though documents of the utmost legal importance, when monarchs were strong enough to make their pleasure their subjects’ will, certainly at the present day possess more of historical curiosity than legal validity.

Various sorts of impediments, clogging the usage of the public records, have been accumulating for ages, until they have become quite insupportable. The mischievous consequences must have been grievously oppressive to suitors and to the legal profession, and must continue so as long as the administration of justice is dependent on proof of prescriptive rights.

¹ Rot. Claus. 9 John, M. 3.

Historians as well as lawyers have grounds of complaint, but it may be remarked that writing history is a voluntary performance, whilst a suit at law is a matter of necessity.

These impediments owe their origin to a multitude of causes. To the disarrangement and confusion amongst the records themselves,—the want of proper facilities of reference by means of Calendars, Catalogues, and Indexes ;—to the imposition of fees, which almost wholly impede the consultation of records in the repositories ;—to inconvenient regulations ;—to numerous and destructive places of deposit ;—and to irresponsible, negligent, and antiquated custodyship.

A commission to redress these grievances was issued in 1800, which has been reappointed from time to time. During this period a sum of £824,256,¹ at the lowest calculation, has been devoted by the public to promote the good of the records of the United Kingdom of Great Britain and Ireland.

We propose to examine in the present article—first, the mode in which the Commissions have employed the money intrusted to them for the reformation of the record system ; and then to exhibit the results of their labours, as they are shown by the present state of the records. For the means of doing so the public must thank Mr. Charles Buller. A folio volume of nearly 1100 pages, besides a report of 45, is evidence that he must have had no little toil during the last Parliamentary Session as chairman of the select committee, appointed at his instance to investigate the whole subject.

It would seem that this matter of record reform was beset

¹ Composed of these items :

£362,400 at least, paid to the Commissions between 1800 and 1831, as appears from very imperfect Parliamentary returns.

48,500 paid to present Commission.

34,000 voted last session, £24,000 of which for paying the debts of the commission.

116,040 as salaries for custody of records at Tower and Chapter House alone.

113,316 as fees estimated on the average of the years 1829, 1830, 1831, when they had been much reduced by changes in the law of tithes, &c. (See Report of Commission now in preparation.)

30,000 at least for removal of records from one repository to another.

704,256

120,000 to Irish Record Commission.

£824,256 Total.

with difficulties which have baffled human wisdom during a period of at least five centuries. Since the 19th year of the reign of Edward II., when we find Robert de Hoton and Thomas Sibthorp¹ to be Record Commissioners to arrange and methodize records and reform abuses, scarcely a single reign has passed without the formation of one commission after another, or some legislative enactment, until the 1st of William IV., when heaven sent its instrument, the Lord Brougham, to furnish a climax to these royal impotencies.

In the reign of Edward III., three commissions, a least, were issued.² Statutes for the preservation of records were passed 11 Hen. IV., c. 3, and 8 Ric. II., c. 4. Henry VI., VII. and VIII. made sundry regulations. Elizabeth instituted inquiries about the records of Parliament, the Chancery, and the Exchequer. James I. proposed "an office of general remembrance for all matters of record," and a State Paper Office, which Charles II. established. His father, Charles I., likewise had issued commissions of inquiry. In the reigns of Anne, George I. and II., similar inquiries were prosecuted. Record repositories have been examined incessantly, and numerous reports and recommendations made during the 18th century by committees of Lords and Commons. Yet after all these reiterated proceedings, a committee of the House of Commons in the year 1800 addressed the King, setting forth "that the "public records of the kingdom were in many offices unarranged, undescribed, and unascertained;" that many of them were exposed to "erasure, alteration, and embezzlement, and "were lodged in buildings incommodious and insecure." Upon this discovery the King issued the first of a series of six Commissions, wherein he directs the records to be "methodized, regulated and digested"—"to be bound and secured"—"exact calendars and indexes to be made," and "original papers" to be printed. *Da Capo* should have been the concluding words of the Commission, for since that time to 1831, when the present Commission, with some very slight variations, was issued, the same *rondo* has been performed. "Methodize records," &c., in 1800; *encore* in 1806. "Methodize records," &c., *encore* in 1817.

¹ Rot. Claus. 19 Ed. II. m. 26.

² Rot. Claus. annis 34. 36; and Rot. Parl. anno 46.

"Methodize records," &c., *encore* in 1821. "Methodize records," &c., *encore* in 1825. The performers were varied, but the instruments and machinery remained entirely the same.

The Commissions, even if disposed, possessed no sufficient powers to act: and they soon ascertained, as the present Secretary tells us, (Ev. 389,) "that the keepers of the record offices may shut the doors in the face of the Commissioners." The accumulated abuses of five centuries were not to be swept away so easily. When methodizing records and restoration of order was attempted, the keepers protested against the "violation of their vested rights," and did "shut the doors in the face of the Commissioners." Such, indeed, were the prejudices in favour of disorder, that they even suffered the arrangement effected by the Commission in the Exchequer, to be restored to its pristine state of confusion. The Commission looked on patiently all the while.¹

The Commissions abandoned their principal duty, arrangement of records, and betook themselves to printing records. Against this operation the office-keepers *did* not shut the door in the Commissioner's face. And why? because no vested rights were infringed, and it was most pleasant to receive fees² for admitting Public Commissioners to transcribe Public Records, and to obtain the gloss of a literary reputation, and be paid five times more in hard cash for editing a record than any publisher would risk on an original composition.

¹ Mr. Vincent, the King's Remembrancer, said in 1832, (*Agenda*, p. 72,) "Besides other accidents and inconveniences occasioned by the removal in 1822, it happened that the records which had been transcribed, and some of them printed, by order of the Commissioners of the Public Records of the Kingdom, viz., The *Inquisitiones Nonarum* and *Nonæ Rolls*, and other records, entitled 'Monastic Records,' were placed, several years before 1822, in a record room at Westminster, and they, with others, were removed from the record rooms adjoining the Court of Exchequer, to a temporary shed or building erected in Westminster Hall and some to the Stone Tower, in 1822, by labourers, without the presence and superintendence of any officer of the Court, without any order or method, in sacks, baskets, and on their shoulders; and some of these were found amongst the mass of unarranged and unsorted records which were removed from the above-mentioned shed to the King's Mews at Charing Cross, in 1831, and where, it is suspected, there were and are many others."

² E. g. Mr. Bagbearer Winton received, as fees for mere admission, 35*l.* 5*s.*—(*Parl. Return*.—Ev. Illingworth, 832.)

Thus the Commissions, content that the nature and extent of their operations should be limited by the very keepers over whom and whose proceedings they were appointed to preside, and content, moreover, to perform only such work as the keepers permitted them to do, provided Mr. Record Keeper Caley (its secretary) with the editorship of *seventeen* distinct works. Mr. Caley earned 694*l.* on one, the *Rotuli Hundredorum*;—2100*l.* on another, *Rymer's Fædera*;—1034*l.* on a third, the *Inquisitiones post Mortem*; he all the while holding the “sinecure” keepership of the Chapter House, at 400*l.* a year, besides fees; and the equally sinecure keepership of the Augmentation Office, which returned to him on the average for many years 600*l.* a year in fees, together with his secretaryship at 200*l.* a year. Mr. Record Keeper Vanderzee, of the Exchequer, “opened the doors” on an understanding (we presume) that he should edit the “*Inquisitiones Nonarum*” for 1057*l.* Mr. Record Keeper Bayley, whilst in the nominal performance of duties at the Record Office, Tower, actually received a sum of 10,755*l.* Of this sum 1572*l.* were paid for some professed labours on certain calendars of “*Inquisitiones post Mortem*,” which omitted the most valuable information (Ev. Roberts); 5572*l.* for *Rymer's Fædera*, scarcely any thing but a reprint of the old edition, with its errors (Ev. Beltz, 6730, &c.—Ev. Tytler, 4287, &c.); and 3611*l.* for Calendars to the Chancery Proceedings.¹

¹ A committee of the present Commissioners passed a judgment on this production, *strongly censuring* it. So valuable a *recherché* did the Commission regard this judgment, that twenty-five copies only were printed on the finest drawing paper at the public expense. The name of each Commissioner was printed in letters of blood-red ink in their respective copies. Of the pomp with which this inquiry was conducted, and of the necessity for printing the details of it at the public cost, our readers may judge by the following deposition, which is made to occupy one entire page.

APPENDIX P.—Deposition of Mr. Thompson.

1. “Are you one of the warders of the Tower?—I have been a warder in the Tower about seventeen years.

2. Did Mr. Bayley ever employ your son to copy for him?—Yes, he did; I do not recollect the time; it might have been nine months ago; I cannot say exactly.

3. Did your son ever copy for Mr. Bayley at your house?—He did, I believe; for he had a book there.

4. Where is your house?—Upon the parade in the Tower.

Excepting some reparation and binding of records at the Augmentation and Chapter House offices (Mr. Caley, the secretary, being the keeper of those offices), the Duchy of Lancaster and at the Rolls, executed in the rudest and most careless manner, these Commissions did nothing but print enormous folio volumes. Most of them were imperfect, or rather incomplete, because the contents of the offices were unknown; but of this we shall speak hereafter. Most of them were produced with reckless indifference to accuracy,¹ on which the chief value depended, and most in a size requiring two men to lift them. Mr. Justice Littledale (Ev. 8300) complains that the Statutes "are printed upon enormously large paper, and extremely inconvenient for any body to have in their library. It is an immense folio; it is a great deal too large and cumbrous." Mr. Parkes (Ev. 4412) thinks it a "matter of great regret" that the statutes were not printed in a more convenient and "less expensive form; it would have been extremely useful to the profession." Of the cost at which they were produced we select a few examples:—2 vols. of *Originalia* cost 5605*l.*;—2 vols. of *Hundred Rolls*, 9251*l.*;—1 vol. of *Placita*

5. Do you know what the book was?—No, I do not; I believe I heard it was some book of Elizabeth.

(signed) C. P. COOPER.
A. THOMPSON.

The above questions and answers were read over by Mr. Cooper to Mr. Thompson, who afterwards signed the same as above in my presence.

August 3, 1832.

GEO. SMITH."

¹ We learn that reading and copying MSS. is a science subject to progressive improvement. "The progress," says the secretary (1833), "made in the science of records has enabled the present Commissioners to detect many errors." It is singular that the most accurate record publication ever executed is *Domesday*. This work was printed without the superintendence of any Record Commission; but perhaps the theory of progression is intended to apply only to Record Sub-Commissioners. "Relying too much on the judgment of the keepers of the records, the old Commission printed calendars to some records in the Tower, so defective that, as appears from the copy of the most perfect of them, which is daily used in the Tower, and which was produced before your Committee by Mr. Hardy, half the requisite information had been omitted or inaccurately given."—Report, p. xxiii.) "It seems to be admitted on all sides that great errors and defects are to be found in almost all the other works. The copy of one of the printed calendars of the Tower Records, which has been before mentioned as having been exhibited by Mr. Hardy, affords a lamentable instance of the errors to be discovered by the necessity of a careful collation for practical purposes."—(Report, p. xxx.)

de quo Warranto, 4178*l.*;—3 vols. of *Rymer's Fædera* (chiefly a reprint), 30,388*l.*;—11 vols. of the *Statutes*, 59,392*l.*;—2 vols. of *Parliamentary Writs and Returns*, 27,221*l.*¹ To be brief, the present secretary states that “360,000*l.* passed through “the late Commissioners’ hands, and there is no trace of it “whatever.” (Ev. 2268.)

The present Commissioners have placed beyond a doubt the exact value at which they estimated the printed works of their predecessors. Soon after Lord Brougham’s Commission was appointed, sixteen tons weight of the publications were first mutilated, and afterwards sold at 4*d.* per pound as *waste paper*. The Vicar of Holbeach (Rev. James Morton) received some goods from his grocer at Holbeach wrapped up in sheets of the before-mentioned *Originalia*, which had cost 5,605*l.*; and of the *Valor Ecclesiasticus*, which had cost above 15,635*l.* This looks so fabulous that we must quote the words of the Evidence.

5240. (*Chairman*.)—“Did these works appear to have been “used?—They had not been soiled or fingered in any way; “they appeared perfectly new.”

5241. “Had they been bound?—No; they had been in “boards, but the boards were torn off.”

5242. “They did not look as if used at all?—No; and the “maps were in the *Valor Ecclesiasticus*.”

5243. “Where did he say they came from?—From a sta- “tioner in Aldgate, whose name he told me, but I have for- “gotten it.”

5245. “You heard from the grocer he had a hundred “weight of them?—I believe he had several hundred weight; “they were used in his shop for a long while afterwards, and “I do not know that they are yet exhausted; I think I saw “some not long ago.”

5246. “This is the way in which these documents are dif- “fusing historical information all over the country?—It ap- “pears so, and I was very sorry to see it.”

Sir Thomas Phillipps purchased “two hackney-coach “loads.” (Mr. Hardy’s Ev. 3684.) Sir Thomas Phillipps is asked, (7541,) “Do you know how many tons of Record

¹ These sums are taken from Parliamentary Returns, analyzed in Sir H. Nicolas’ “Refutation.”

"publications have been destroyed by the present Commission, by selling them as waste paper?—I understand about sixteen tons."

7542. "How was this done?—I saw some of them after they were in the shop of the person to whom, I presume, they were delivered; the covers were torn off, and I believe the two first sheets, and the two last, in order to call them imperfect copies."

7543. "Do you suppose that this had been done in order to make them imperfect?—I apprehend so, from the violence used."

7544. "Do you know whether among those that were sold as waste paper any perfect copies were got?—Of the Testa de Neville; that is to say, it was perfect before the leaves were torn off, but the leaves were torn off from all which I saw."

This feat, which the secretary describes as "selling the surplus copies of the publications at certain reduced prices" (Ev. 7702), was accomplished, he says, by Lord Brougham and Mr. Bellenden Ker.

We shall now proceed to see how the present Commission, under the auspices of the self-constituted law reformer of modern times, improved the system of operations.

A new Commission was required at the accession of the present King, and Lord Brougham, big with good intention, and burthened with plenty of spare time, set up for a Record Reformer, in addition to his thousand and one other schemes. Mr. Bellenden Ker (the conveyancing member of the criminal-law commission) is reported to have been Lord Brougham's agent in framing the new Commission. Be this as it may, the first sentence contains an equivocation, intended to serve the purposes of his Lordship.

Lord Brougham desired to be an official Commissioner *quâ* Lord Chancellor, in order to sit as a chairman, and to hold a commissionership on a securer footing than as Chancellor. See then how it was to be effected. The Speaker (Lord Canterbury), Sir John Leach, and others, were nominated as Commissioners "*for the time being*," in respect of their offices. Lord Brougham omitted the words "*for the time*

being," and nominated himself "Henry Lord Brougham and Vaux, our Chancellor of Great Britain." And when reciting himself in other clauses in the capacity of a quorum Commissioner, as he could not with propriety say "Henry Lord Brougham, &c.," he employed the terms "our said Chancellor." There may be a doubt, therefore, whether Lord Brougham be any Commissioner at all, although there can be none that he is *not* a quorum Commissioner, as he was given to understand pretty plainly, once, when he offered to take the chair in preference to a gentleman, about whose title to the office not a shadow of a doubt existed.

The old strain is sung in the present Commission: twenty-five unpaid "dearly-beloved cousins," &c., are employed for the sixth, and, we hope, the last time, "to methodize records, &c." In addition, they are directed (and this is the only difference between the present and past Commissions) to "make full and diligent inquiry into the duties of the several officers, &c., the salaries, fees, &c., and regulations of the offices, &c."

A short epitome of the performances of the present Commission will be an appropriate introduction to some exhibition of the present condition of the records, and the state of the records will furnish the best means of judging of the Commission's efficacy and utility.

The first act of the Commission was an act of tyranny. It "forced" on "the reluctant acceptance" of Mr. Cooper, as he tells us in a preface to an "Account of Public Records," p. vii., "the troublesome and most unprofitable office of Secretary." But he comforted himself with the assurance of "an express understanding with Lord Brougham, that the record business was to yield to his private law avocations, and, to use his own words, 'that the condition on which he accepted the office of Secretary, was, that its duties should be made in all respects secondary and subordinate to his professional avocations¹.'" (Mr. Protheroe's Ev. 1318. 1329.)

¹ Mr. Cooper measures the exact quantity of the time he bestows on the Record Commission. He says he has "devoted more than *half* his *whole* time to the business of the Commission." (*Agenda*, p. 17.) "Elsewhere," he says, "I use part of the house in Boswell Court as my chambers, (being the same he used before he was Secretary,) to enable me with less loss and inconvenience to attend to the affairs of the Board. Under any other circumstances than those in which I am

Mr. Cooper "believes (Ev. 2777) it was the circumstance "that he did not possess a knowledge of the ancient records "that induced the Board to force upon him (for Lord Brougham forced upon him) the office of Secretary, rather "than upon a record man."

The whole business and management of the Commission was left to Mr. Cooper and Lord Brougham, the latter being consulted when Mr. Cooper needed his Lordship's aid. Mr. Cooper writes to Mr. Bellenden Ker¹—"The Chancellor upon "my appointment gave me particular instructions as to the "direction to be given to my labours, and desired me in any "matter of difficulty to consult him; and this I have invariably done, and no one measure of any importance has been "taken, which was not previously communicated to him, and "his written or verbal approbation obtained: amongst those "measures of course are included the publication of the two "volumes by myself."

The advice of the Board appears to have been sought only on those occasions when "there is any disagreement." "I go "to the Board," says Mr. Cooper, (Ev. 7796,) for the sake of "relieving myself from any unpleasant responsibility." "It "appears," states the Report, p. xxxi., "from a return laid "before your Committee, that in a period of nearly five years, "thirty-eight Boards were held, and only seven of the 25 Commissioners attended at more than half of these. The Boards "were called by the Secretary at his direction. They sat "rarely more than two or three hours, their duration depending on the time at which some of the leading official members could conveniently come, and that at which they were

"placed by my connection with the Commission, I should of course have chambers "in Lincoln's Inn, Old or New Square, or in the Stone Buildings. There is, "I believe, no example of a Chancery barrister, with a practice equal to mine, "carrying on business out of the Inn; and there can be no doubt that much prejudice has accrued to me from that circumstance within the last five years." Indeed he avows, in a printed letter (dated August, 1835,) that he has lost his recollection of some official transaction, "apparently from the great increase of my professional avocations." Being asked by the Committee (Ev. 3096) how a man could write a book at two years of age, as Mr. Cooper has somewhere or other made it appear, he says—"With my multitudinous occupations I cannot answer these "questions now." He writes to Mr. Holbrooke (Ev. 1270), "I find so little gratitude for my exertions, that I am half disposed to throw up my office, which has "been to me the source of no small loss in my profession." [The salary is certainly small in proportion to the services required, and Mr. C. does not appear to have derived any other pecuniary advantage from the office.—*Edit.*]

¹ Letter on Office of Secretary, printed 1832.

“ forced to go away to attend to other business. The business
“ to be done at these Boards was arranged by the Secretary.
“ The correspondence was carried on by the Secretary.
“ Letters of great importance were not laid before the Board.
“ Notices and communications of the Commissioners them-
“ selves appear in the same way to have been liable to be
“ suppressed, or only partially communicated to the Board.
“ Some business of the Commission was also done by commit-
“ tees.” . . . “ He possessed, as will appear from the following
“ more detailed statement, the entire control over the funds
“ and disbursements of the Commission, of the preparation of
“ its works, of the engagements, salaries, and duties of all
“ persons in the employ of the Commission, and of the distri-
“ bution of all its publications.”

Though such be the fact, and whatever may have been done, even had the Secretary—as he wrote to and “ jestingly informed” Mr. Protheroe (Ev. 1476), and “ the Chancellor of
“ the Exchequer, that he might have put the £10,000 in his
“ pocket and gone to America”—actually gone to America, we hold that the responsibility rests with the Board and not the Secretary ; and, in justice, we shall speak of all proceedings as the acts of the Board itself.

This Commission, like its predecessors, appears soon to have ascertained that it possessed no effective powers to do any thing except printing, and that the Record Office keepers might “ shut the door in its face.” “ In some cases,” says the Report, p. xxv., “ supposed impediments on the part of
“ the keepers have been evaded by irregular means ; in some,
“ the operations of the Board have been wholly stopped,
“ owing to what have been represented as unreasonable pre-
“ tensions on the part of the keepers ; but nothing has been
“ done in the way of removing these obstacles, by applying to
“ the legislature to invest the Commission with that power,
“ which alone could enable it to discharge its duties in a satis-
“ factory manner.”

Not despairing, various manœuvres and stratagems were tried to remove the difficulties, some of which we shall recount. Here is one sort of diplomacy employed. In order to get access to the records of the Pipe Office, the Commissioners took the circuitous method of printing a Pipe Roll that had acci-

dentially strayed into the Chapter House. We quote our authority for this statement, which appears so much like fiction. The Commissioners state in the *Agenda*, p. 61, "There is reason "to believe that arrangements may eventually be made for the "transcription and publication of the early Great Rolls at "Somerset House; but too many obstacles present themselves at present, to afford hope that any progress can be "made in so desirable a work for some years to come. The "printing, however, of the three rolls above-mentioned, will, "for reasons which it is not necessary here to state, considerably "facilitate ulterior measures. The production of the printed "sheets of the Chapter House Roll has wonderfully tended "to diminish certain official difficulties and scruples at Somerset House."

The Commissioners reasoned thus: "If we print this Pipe Roll in the Chapter House, the keeper at Somerset House will see that Pipe Rolls may be the means of giving him a job, and then possibly, for his own interest, he will give us admission to those in his custody."

The above statement was made 22d January, 1833. On the 22d of June following, the public is informed, (*Agenda*, p. 361,) "There is every reason to believe that the hopes "which it was some time since stated to the Board were entertained, of an arrangement being made for transcribing "and printing the Pipe Records, will not be disappointed." These hopes, "until very recently, circumstances had rather "tended to *weaken* than to *strengthen*." The Roll was printed with this laudable purpose, and an "eminent topographical writer" (see *Agenda*, *passim*) transported from Bath in order to write the prefaces of this work and of the "Rotuli Selecti,"—a Mr. Joseph Hunter,—candidly avows in the preface, p. ix., that it was selected, "not on account of "any peculiar curiosity belonging to it but of the greater "facilities of access which were afforded to it, for the purpose "of transcription or collation, than were at that time afforded "either to the great mass of the Chancellor's Rolls, or to the "Rolls of the Treasurer at the Pipe Office."¹

¹ The following amusing examination on this work took place before the Committee. At the same time we see how advantageously for the public the work was executed. (Ev. 1915.) Chairman to Mr. Cooper—"Is not the facility of access to a

The Commissioners augured rightly, and got admission to the Pipe Office. They began the arrangement of the records there, quarrelled with the keeper about the rate of remuneration, having paid sixpence per folio for transcription, which they wished to reduce to fourpence. (Ev. Panton, 7105, &c.—Cooper, 176, &c.—Vincent, 1697, &c.) They were turned out, and the methodizing the records was suspended.

The proceedings with respect to gaining admittance to the King's Remembrancer's Office, are still more extraordinary. Here the Commission did not stimulate the keepers to action by indirect means, but directly tampered with subordinate officers. Records were transported through the instrumentality of these subordinates, from their legal repositories to the Commission's chambers in New Boswell Court, without the

"document the very reason why you should not print it?—Yes; but only where it is likely that such facility of access will lead others to print. My notions on the sufficiency of transcribing have undergone a considerable change since the year 1832."

1916. "Particularly when it is stated, it is not peculiarly curious?—That statement only means it is not more curious than others of the same class. The real motives for printing this roll I have stated without disguise: the desire to present the historian and antiquary with a specimen of these records, and to pave the way to the transcription and publication of the rolls in the Pipe Office."

1917. "The motive of publication, then, was to get into the Pipe Office?—That was one motive only."

1918. "Do you think that a Commission is authorized to publish works in order to get into an office?—I am not sure that it would be improper to publish a single octavo volume with that view only, supposing that certain measures were enjoined such Commission, and successive governments, in spite of frequent representations, neglected to confer the power requisite for the execution of such measures. But I deny that the only motive for printing the Chancellor's Roll was to get into an office; that would not, I submit, be a fair inference from what I have said."

1919. "Are you aware that out of 366 pages, 208 were cancelled?—I am not aware of that."

1920. "Is it not stated in this return?—The King's printer's return?—I think I understand what you mean. Mr. Devon collated this Chancellor's Roll with the corresponding Pipe Roll, and printed the results in an Appendix, which extended to about 100 pages. His introduction also exceeded 50 pages. All this, together with other parts of the volume, was cancelled. Possibly in all 206 pages may have been cancelled, but not 206 pages out of 366 pages." As the King's printer's return specifies the names of the actual sheets cancelled, as B, C, E, H, &c., which appear in the work as now published, the explanation does not apply. The work contains 362 pages, and of these thirteen and three-quarters sheets, or 220 pages, were cancelled. (App. c. 8, p. 816.)

knowledge or assent of their responsible keeper.¹ It is not necessary to characterize with fitting terms such conduct in a public Board; and a public Board at that time ostensibly directed by the Chancellor of England! The fact that such a proceeding *could* occur, affords irresistible proof of the defects of the present system.²

But the Commissioners went beyond this even, and subjected themselves to an action of ejectment. They positively took possession of the Augmentation Office and all its contents, claiming to do so on the authority of Lord Grey, who they well knew possessed no power to give them admittance. Lord Grey, when applied to, wholly disclaimed having given any authority whatever. (Ev. Mr. Vincent, 1685, &c.) Having gotten possession thus of these records, the Commission commenced certain operations of arrangement upon them, which were suspended because some one said "No credit was due to them."

Excepting binding some few records into volumes at the Rolls Chapel, out of which the clerks of the office remove them (Ev. Palmer, 6252. Report, p. xi.) when required for use, the present Commission has done nothing worth mentioning in other offices, to further the arrangement of records.

Similar indirect means were employed to perform other work than the arrangement of records. Certain transcripts of records were desired and ordered to be made at the Tower, *sub rosa*. (Ev. Petrie, 3499—Cooper, 1854—Protheroe, 1309.)³ No transcripts of records, with the view of perpetuating them, have been made at all, as directed by the Commission, but quantities of transcripts of transcripts have been made, viz., of those which Rymer rejected from his *Fœdera*; than which

¹ See *Agenda*, page 448, where the fact of removal is stated, and the evidence of Mr. Vincent, (1729,) &c. proving that it was done without authority.

² The Barons of the Exchequer are the head custodes of these records; the King's Remembrancer the responsible chief. Thirty-two clerks in Court can demand, by prescription, unrestrained access to these records at all times, and the most inferior officer, the Bagbearer, keeps the keys. The Commission employs as its instrument one of the thirty-two clerks, and succeeds; because neither Barons, Treasury, nor King's Remembrancer, have instituted any sufficient check.

³ It is due to Mr. Petrie, to notice his indignation, and to Mr. Protheroe to quote his rejection of any participation in such proceedings. "The mode," says he, (1309,) "of evading the difficulty, was not only not an advisable one, but a highly improper one."

proceeding Sir H. Nicolas says, (Ev. 4235,) "I cannot conceive any thing more useless."

The arrangement of disordered records, and provisions for their accessibility, have been boastfully stated as duties which should take precedence of printing. "It should be remembered that the arrangement of records, the compilation of calendars, the investigation of the duties and emoluments of the officers, and the reform of some notorious but deeply-rooted abuses, constitute the great and primary object of the Commission; and that the printing of certain of the more ancient and valuable amongst the records is enjoined only as a secondary work."¹

Of the sum of 60,000*l.* only 3865*l.*, including workmen's wages, have been directly applied to the object of arrangement. The balance, for the most part, has been scattered with profuse extravagance all over Europe, and distributed to every purpose but the right one. Since 1831 (App. C. 2 & 3,) the king's printers have received about 11,400*l.*, and they are still creditors to the amount of 3360*l.* The Commission's "private" printer has received 2700*l.*

About seventy volumes of all sizes, from a large folio to a duodecimo pamphlet, have been either published or commenced. "Certain more ancient and valuable records, and calendars, and indexes," are defined in the Commission as the only objects for publication. Some few ancient and valuable Records, as the Chancery Rolls of John, the Rolls of the Curia Regis, a Pipe Roll, and specimens of ancient 'Pedes Finium,' have been printed. No calendars or indexes to records have appeared. A very large proportion of the printed works consists neither of 'ancient and valuable records,' nor, indeed, of any records at all."²

¹ Preface to Account of Public Records, p. xi.

² In November 1832, (*Agenda*, p. 41,) a General Report was thought necessary, and in order to obtain a deliberate and well-digested report, materials for it were put into the hands of an individual, "by the desire of the Lord Chancellor," who knew nothing of the subject, and had formerly been an architect,—a Mr. Webster.

1115. "A great delay was occasioned by the incompetency of Mr. Webster?"
"—Twelve months were lost."

1116. "It was that time before you discovered he was incompetent to the business?—Yes; his engagement was for twelve months."

The Commission's policy in printing has partaken of its ordinary crookedness. We produce, as illustrations, its conduct in two works,—the publication of the early Rolls at the Tower, and the Account of the Public Records. We begin with the latter work.

“In two octavo volumes, nicely bound,

“With notes and preface, all that most allures

“The record purchaser :————

At a board held 22nd of August 1831, “The Secretary stated, that, with the approbation of the Lord Chancellor, “he had commenced this compilation.” (Ev. 132.) Though an order was made to print this work at the public expense, it was published with all the semblance of a private speculation.¹ Some of the Commissioners were thereby misled. Mr. Wynn rebuked Mr. Buller in the House of Commons, on his alleging that the public had paid for it. Mr. Wynn was astounded when Mr. Jervis, in reply, read from a printed Parliamentary return, prepared by the Commission, the following :—

“Messrs. Roworth for printing Account of Public Records, &c. £413 : 0 8” (App. C. 2, p. 759.)

The work was compiled chiefly from reports already printed, and other materials. These were obtained and employed in a mode not very conducive to the credit of a public Board.²

1117. “On what recommendation was Mr. Webster engaged?—The immediate recommendation was Lord Brougham.”

1118. “What testimonials of competency were produced?—I am not aware.”

1119. “Do you mean that Lord Brougham, as a Commissioner, recommended Mr. Webster for this work to the Commission, and that the Commission acted upon the recommendation?—The Commission acted upon the recommendation of Lord Brougham.”

1120. “You do not know what testimonials Lord Brougham produced of his fitness?—No, I do not.”

From Mr. Webster the materials passed to Mr. Hardy, (Ev. 3658,) from him to Mr. Hunter, with whom they remain. He seems to be an agent, always obedient to the nod of the Secretary, of inordinate conceit and proportionate emptiness.

¹ In the publications of the old Boards, the order for printing was always inserted. This practice, which stamped the works with official sanction, has been disused by the present Commission.

² The learned editor of the “British Historians,”—Mr. Petrie, of the Tower, drew up some long communications, which somehow found their way into this work without his consent. He says, (Ev. Petrie, 3492,) “The first knowledge I had of a design to print anything of the kind was, by receiving from the Secretary

In order to complete the history of this work, we print the following modest prospectus, or card, which was circulated by the Commission. It is now a rarity; and, we believe, we possess one of the few copies in existence.

" Paternoster Row, September 1832.

" SIR,

" We take the liberty of drawing your attention to the work, the title of which is on the other side. It has been printed by the order of His Majesty's Commissioners on the Public Records of the Kingdom; and gives, in a *short compass, a very full and interesting account* of the contents of the numerous volumes presented by them to your library, and is *generally considered as a necessary companion to them*. The Commissioners have determined that it shall not be given away, but sold to defray the expense. There are a few copies only remaining on hand,

" We have the honour to remain, Sir,

" Your obedient humble servants,

" BALDWIN & CRADOCK."

This circular was printed at the public expense: it succeeded in provoking a sale of 144 copies only. (App. C. 10, p. 818.) We understand the book was freely distributed abroad, and is frequently found on the book-stalls in Paris.

The publication of the early Rolls of the Tower, though extolled by the Secretary (Ev. p. 88,) as forming "a part of the " noblest monument ever erected to the ancient glory of a " people,"¹ has been suspended on account of some personal pique between the editor and the Commission. Want of funds is urged as the reason for the suspension, which cannot be admitted, because the Commission at the very time was

" a proof sheet of the list of manuscripts which I had caused to be transcribed for " the work on which I was engaged, with a request, on the part of the Commis- " sioners, that I would correct it for the press. I was very much struck with this, " and I wrote to the Secretary, to request he would furnish me with a copy of the " order of the Board for the printing of this list; but I never got any answer from " him. I was told he had never received my letter; but he never repeated his " application to me for the proof sheet, which I have in my pocket; so that whether " the whole of this be surreptitious, or whether it had the authority of the Board, " up to this moment I know not. The impression on my mind is, that it is surrep- " titious; but peculiar circumstances induced me, as well on that as on some other " occasions, to abstain from addressing the Board on the subject." Mr. Hardy complains likewise (Ev. 3653), as does Mr. Illingworth (Ev. 841).

¹ Vide Evidence, 2611 to 2629,

procuring transcripts from Hamburg, at an extravagant cost, made from secondary and imperfect sources, whilst the original and authentic enrolments of these very transcripts existed in the Tower.

It is very difficult to analyze the confused mass of figures presented by the Commission to Parliament as returns of its expenditure. With Hamlet we may ask, "How its audit stands, who knows save Heaven?" We have attempted a classification of the payments, and find the following to be the results.

The salaries, as they appear with the name of the individual receiver, amount to 29,000*l.*, and more. The ungracious task of regulating these salaries, as well as every other sort of payment, was imposed on the Secretary. The entire funds of the Commission were at his sole disposal. He complains to the Chancellor of the Exchequer, just before the Committee was appointed, "of the inconvenience experienced by him from the importunities of persons in the employ of the Board, calling upon him to make advances on account,—applications which he had much difficulty in refusing, from the knowledge which such persons had, that his signature to cheques was alone required." (App. D. p. 829.) His endurance of the "inconvenience" for six years is certainly very remarkable.

The Commission, neglecting to search English repositories for materials for the *Fœdera*, has expended at least 3597*l.*,¹ in

¹ As a specimen of the muddled nature of the Commission's returns, we extract the following verbatim. (App. C. 3, p. 7.).

"New edition of Rymer's *Fœdera*, searches for and transcripts of materials for this work, together with freight of papers, some few books, and other expenses, from 12th of March 1833 to 31st of Dec. 1835. Payments of various amount to Messrs. Masterton, Greith, Koch, Lappenberg, Maier, Warnkœnig, Teulet, Stadler, Lacabane, Castelnau, Voigt, Royer Collard, Serrure, Kansler, Mone, De Portugal, Massmann, De la Fontenelle, Vadoré, Lechaudé, D'Ainsy, Deville, Gachard, Guillemot, Marechal, Herbst, Lassberg, Schreiber, Jung, Boehmer, Pape, Lacomblet, Fuchs, Hullman, Verachter, and *others*, for the most part librarians, archivists, and professors abroad . . . £3135:12 9½"

From the Treasury Analysis (App. p. 836) we learn how this sum was apportioned.

	£.	s.	d.
M. Baur received	376	18	5
M. A. Collard	556	14	3
L. A. Warnkœnig	558	18	4 &c.

The folly and extravagance of the Commission is the laughing-stock of the Continent.

salaries to foreigners, to search foreign archives, and in manifesting the existence of the Commission to the nations of Europe.¹ And whenever (should the time ever come) "Appendix A." to Rymer's *Fœdera* is given to the world, our countrymen will learn that the "*Tractatulus Egidii de Urinis*," and the "*Carmen Johannis Egidii de Urinis cum glossis*," were once to be found at Altdorf; that "*Evax Marbo-deus's*" work on Stones, existed at Geneva, and that copies of the Legend of St. Ursula, and the 11,000 Virgins, were procurable at Basil, Bern,² &c. &c. all over Europe.

Another item for the promotion of record reform is 382*l.* 15*s.* (App. D. 5, p. 837,) expended in "alterations in the "attic story, kitchen, coppers fixed, stoves altered, new "stoves supplied, refixing chimney-pieces, contracting chimnies, rebuilding fire places in certain chambers at New "Boswell Court." (Ev. Protheroe, 7640.)

The Commission has collected a "palæographical and diplomatic library," costing 1624*l.*, which is stated in the return to "have been found of great utility to the school of young transcribers." (App. C. 3, p. 771.) This institution, in professed imitation of the *Ecole des Chartes* at Paris, is explained to consist of four young gentlemen copying Rymer's rejected transcripts at the Museum, "at the small salary of 40*l.* a year." (App. B. 3, p. 743.) The interest paid for loans has amounted to 719*l.* The stationery, &c., from March 1833 to

¹ To Germany the Commission published, "*Die Archiv-Commission Gross Britanniens an die Alterthumsforscher Deutschlands und des nordlichen Europas*, 8vo.

To Portugal, "*Memoria da Commissão dos Arquivos da Gran-Bretanha dirigida aos Cartorarios Bibliothecarios e Antiquarios de Portugal, pelo que respeita aos trabalhos, e exames da mesma Commissão*. 8vo. (App. C. 3, p. 781.) Mr. Masterton was paid 300*l.* for a trip to Lisbon, amongst other things to secure the printing of this important document at the royal press of Donna Maria. (Ev. Cooper, 2954, &c.) "I think," says Mr. Cooper, "it was rather a bold step to send him thither;"—"the result has justified the experiment." Let the public therefore sing "Jubilate."

² *Vide* Appendix A., pp. 3, 102, 21, 31, 73, 104, 117, 126. The quackery and ignorance of App. A. is beyond conception: It beats Lord Brougham's "*Hydrostatics*" hollow. Take the following as an instance. At p. 7 Mr. Cooper tells us, "*Johannes Andreas* [?] would have been passed over in silence, were not his works (*Treatises on the Decretalia*!) connected with the history of the Civil Law! a science not quite so strange to my habitual pursuits as are those departments of learning to which most of the other Codices belong."

December 1835 cost 2062*l.*, and the other miscellanies upwards of 3000*l.*; and as these items are splendid specimens of economy and clearness we quote them below.¹

Having thus shown some of the principal acts of the present and previous Commissions, and how they have expended their funds, we proceed to describe the actual present condition of the public records; and leave our readers to estimate the benefits which the Record Commissions have conferred on the records themselves. With this view we have prepared the following synoptical table.

¹ Dixon, Gibbs, Lloyd, Bonsor, and others: bills for parchment, vellum, tracing-paper, steel and quill pens, paper, sponge, tape, cord, sealing and other thread, paste, starch, linen and woollen cloths, soap, candles, oil, wood, and *various other materials and articles*, also for presses and tools used in repairing and cleaning the records.....£2062: 10 1½ (App. C. 3, p. 771.)

Miscellanies from 1831 to 1835.

MISCELLANEOUS transcribing, printing, books, deed boxes for records, stationery, parchment for mending records, postage, portorage, coach-hire, &c. March 1831 to March 1832.....£363: 15 10 (App. C. 2, p. 758.)

MISCELLANEOUS transcribing and copying, bags for records, baskets for ditto, desks and stools for clerks, parchment for mending records, stationery, postage, portorage, coach-hire, &c.....£608: 13 2 (p. 760.)

Messrs. Hodgson, Leaver, Williams, Bannister, Bacon, Madden, and Hardy, for various transcripts, copies, and MISCELLANEOUS work and assistance.

£186: 17 7 (p. 760.)

Messrs. Murphy, Bacon, Stack, Bell, Wilde, Berbrugger, Gunton, Matchwick, and Mitchell, various payments for transcripts, searches, short reports, and MISCELLANEOUS labour.....£399: 16 7 (p. 770.)

Expenses attending the forwarding at sundry times certain works of the Board to Paris, Ostend, Ghent, Hamburg, Rotterdam, Lisbon, Leghorn, Dublin, Isle of Man, Guernsey, &c.; also expenses of transmitting to and receiving back from some of the above-mentioned places proof-sheets of the Appendixes to the Secretary's Report on the *Fœdera*, &c.£253: 14 1 (p. 772.)

Desks, and *other articles of furniture*.....£39: 12 6

Leaver, Hardiman, and *others*, for copying returns to parliament, reports, and various papers and documents for the use of the board.....£161: 9 7

Postage, carriage of parcels, extra portorage, coach-hire, cab-hire, van-hire, cart-hire, boat-hire, truck-hire, &c. &c. (*Sic in orig.*)...£674: 16 9½ (p. 773.)

OTHER disbursements not comprised under any of the foregoing heads, and monies in the hands of Mr. George Smith, arising from advances made by bankers or secretary!.....£397: 9 0¼ (p. 773.)

SYNOPTICAL VIEW OF THE PRESENT CIRCUMSTANCES OF

<i>Name of Repository containing Records.</i>	<i>Its Locality.</i>	<i>Its Character.</i>	<i>Custody.</i>	<i>Attendance.</i>
Tower.	Thames Street.	Over gunpowder, next to a steam-engine.	One Keeper, appointed by Treasury. Insufficiently responsible.	10 to 3.
Chapter House. ..	Poet's Corner, Westminster.	Insecure from out-buildings; not fire-proof. Incommodious. Representations often made, nothing done.	One Keeper, appointed by Treasury. The office claimed as sinecure. (4138, &c.)	10 to 1 officially, but open at other hours, according to the pleasure of the Keeper. (4302.)
Duchy of Lancaster.	Waterloo Bridge.	Private dwelling-house, liable to fire. (398.)	One Keeper, with a Deputy.	10 to 4.
Duchy of Cornwall.	Somerset House.	Private dwelling-house. (2977.)	The Auditor of the Duchy, acting through a clerk at the Chapter House.	10 to 4. Searches, when permitted, must be made between 1 and 4.
Rolls Chapel.	Chancery Lane.	Very inconvenient and unfit, not fire proof.	Keeper appointed by Master of the Rolls. Duties performed by Deputy. (A sinecure.)	10 to 3.
Common Pleas. ..	Carlton Ride Stables, Carlton Terrace.	Quite unsuitable.—“Far from convenient and accessible.” (584.)	In the Judges.	10 to 4, in Term Time. Out of Term, the Keeper must be sought for at his private residence.

THE PUBLIC RECORDS AT THE CHIEF RECORD REPOSITORIES.

<i>Arrangement.</i>	<i>Preservation of Contents.</i>	<i>Calendars and Indexes.</i>	<i>Fees, &c.</i>	<i>Species of Records.</i>
Good,—not effected by Commission.	Cleaning, repairs, and binding needed. Nothing done by Commission.	Defective, nothing done by Commission to improve them.	System complained of, but admitted to be very liberally administered.	Chancery and Parliamentary.
Very incomplete. Partially proceeding. The expense paid not by Commission, but Stationery Office. (184, 4342.)	"In their present state the great majority can neither be preserved nor arranged, nor even consulted." (4344.) £7000 required to bind and repair five classes only.	Defective. Some in progress. — Mr. Caley returns the same answer in 1832 as Mr. Rose in 1800, and is "afraid to hazard a conjecture about the period within which Calendars and Indexes might be completed." — <i>App. to Commission's Report</i> , p. 10.	Remitted at the pleasure of Keeper to historical inquirers.	King's Bench, Common Pleas, Parliamentary, Exchequer, Star Chamber's Proceedings, very Miscellaneous.
Still proceeding, not done by Commission. (7206, 7.)	Generally good. — Repairs and binding by Commission suspended. (7208.)	Several, said to be sufficient.	Less fees charged to historical than to legal inquirers.	Relating to Proceedings of the Duchy.
Stated to be methodical.	"Generally in good preservation. No repairs done at the expense of the Commission." — <i>App. to Commis. Report</i> , p. 105, 6.	In progress. Public considered to have no right to see the catalogues. (2984, 3044.)	"No account kept of them." — <i>App. to Report</i> , p. 106.	Relating to Proceedings of the Duchy.
The Rolls well arranged in most inconvenient places. Miscellaneous Records require arrangement.	Repairs required for Miscellaneous Records, Inquisitions post Mortem, &c.	Chiefly private. — These defective. (3364.) Nothing done by Commission.	Loudly complained of as excessive, amounting to a "denial of justice." (6529.)	Chancery and Parliamentary.
Improvable in a better repository. — Nothing done by Commission.	Some Rolls much injured by damp, nothing done by Commission.	? if a y. The Docket Books are imperfect substitutes.	? What and to whom paid.	Belonging to the Court.

<i>Name of Repository containing Records.</i>	<i>Its Locality.</i>	<i>Its Character.</i>	<i>Custody.</i>	<i>Attendance.</i>
King's Bench.....	Private residence of the Master of the Rolls, Chancery Lane.	Not fire proof. Quite unsuitable. Removed from good repository by present Commission.	In the Judges and several Keepers.	None, where the Records are kept. 1st, go to the Temple; 2nd, to Westminster to see the Docket Book; 3rd, to Chancery Lane for Records.
King's Remembrancer's Records in Carlton Ride, Stone Tower, Temple.	Carlton Terrace. — Tower of Westminster Hall.	Stables, not fire proof, wholly unfit. Unglazed.	The King's Remembrancer, subject to access of 33 other persons, as they please.	Attendance at the Temple, none elsewhere, except at Westminster, in Term Time.
Augmentation Office.	Palace Yard, Westminster.	Not fire proof. Narrowly escaped at the burning of Parliament Houses.	King's Rememb.	No proper attendance. Open from 10 till 4.
Pipe Office.	Somerset House.	Vaults underground — wholly improper.	King's Rememb.	Attendance at the Temple.
Lord Treasurer's Remembrancer's Office.	Somerset House.	The same.	The same.	The same.
Land Revenue at Carlton Ride, Spring Garden.	Carlton Ride.	Unfit.	Keeper.	Attendance at Spring Gardens.
First Fruits.....	Temple.	Represented as unsafe since 1800.	Keeper.	10 till 4.
Exchequer of Pleas.	Lincoln's Inn.	Not fire proof.	?	?

<i>Arrangement.</i>	<i>Preservation of Contents.</i>	<i>Calendars and Indexes.</i>	<i>Fees, &c.</i>	<i>Species of Records.</i>
Some on the floors, without order.—No interference from Commission.	The State? Nothing done by Commission.	None. Imperfect Docket Books, (548, 6594.) Kept not with the Records, but at 1½ mile distant—at Westminster.	Payable to several sets of officers.	Belonging to the Court.
¹ Memoranda Rolls, and Equity Proceedings arranged.	Not bad,—dirty.	Abstracts for consulting Equity Proceedings. Wanted.	Payable to Clerks in Courts, Bagbearer, Court Keeper.	Principally Exchequer. Some belonging to other departments.
² 600 sacks or 2400 bushels of Miscellaneous Records.	Very bad.			
³ Port Bonds, Coast Books. "Nature of which none can tell. (Mr. Vincent.)	None.			
Nearly completed by Commission, suddenly stopped.	Defective.	Defective.	Payable to whom?	Ecclesiastical Records respecting dissolution of Monasteries.
Pipe Roll arranged, Miscellaneous not.	Defective.	None.	Payable to whom?, not remitted to historical inquirers.—(Ev. Gage.)	Exchequer Records.
Miscellaneous not arranged.	Defective.	? any to Miscellaneous.	The same.	Exchequer Records.
Disarranged at Carlton Ride.	Defective, but proceeding, not under Commission. (7163.)	Partial.	?	Its own department, chiefly. Exchequer Records.
Some Miscellaneous.	Not wanted.	?	Its own department.
In disorder. (625.)	Necessary.	None but Docket Books.	?	Exchequer.

The dispersion of the offices in all the four quarters of the metropolis; the dispersion of the same class of records in several repositories; the disunion of the office where personal attendance is given, and the repository where the record itself is deposited; the varied hours of attendance, &c., constitute one class of serious impediments.

An inquirer travels from the Tower to Westminster to search not only *different* records, but should he desire to inspect the one series of records, e. g., Rolls of Parliament, he must go to Westminster, to the Tower, to the Rolls Chapel, and even to the King's Remembrancer of the Exchequer, if any one discloses to him the fact that this office possesses Parliament Rolls. Having learnt thus much, which he can do by accident alone, he must first proceed to the Temple, and then, perchance, be obliged to hunt for his object, in the Stables of Carlton Ride,—the Stone Tower at Westminster Hall, or even in the Augmentation Office. The same observation applies to several other series of records:—the *Patent Rolls*¹—*Inquisitiones post mortem*—Rolls of the Law Courts, &c.² The following displays the notions of convenient accessibility of a Record Keeper:

7058. Chairman to Mr. Panton. You said they were in a place perfectly accessible: let us understand how accessible they are; a person who has to consult them does not go to the office they are kept at, but he goes to the Temple?—Yes.

7059. On applying to you for the record he wants; you go off to Somerset House from the Temple and get the record?—Yes, I fetch the record, or send the messengers of the office for it.

7060. If he happens at first not to have specified the right record, or to have made a mistake, or on looking at it finds his inquiries require a subsequent record to be exhibited, you, or the messenger, would have to go back to Somerset House, to go down that long flight of stairs, to light your candles,

¹ Should the Patent Roll of the 7th John be wanted,—the inquirer knowing that the rolls of this time are kept at the Tower, proceeds thither,—he then learns that this solitary roll happens to be at the Chapter House, Westminster,—he arrives at this latter place a few minutes past 1 o'clock,—the official hours are closed, and the officer who shows the roll is gone.

² Ev. Cole. 4762. 7911,

and to penetrate into those vaults?—If there was that sort of uncertainty as to the date of the roll inquired for, instead of leaving the gentleman who required to make the search at the Temple, I should take him with me to Somerset House, where there is a convenient room under the late Pipe Office.

7062. (Dr. Bowring.) Is that quite adjacent to the vaults?—No, it is up on high ground.

7063. Then there are three places which you usually employ in order to communicate between the searcher and the record?—No.

7064. There is your office in the Temple, the vaults, and the place in which, for greater adjacency, you would take the inquirer?—Whichever is most convenient.

7065. (Chairman.) This is an arrangement by which you promote the convenience of the parties; if I come to you, not knowing exactly the record I want, being rather uncertain, if I come to the Temple and state this uncertainty to you, you do me the favour of taking me a walk to Somerset House, and then you shut me up in this room, and you yourself run down to the vaults and bring up the record to me that I suggest, being in this room?—Yes.

7066. There being a constant succession of trips from this room in which I am confined to the vault in which the Pipe Rolls are confined, you manage, in the course of time, to get me the information I want?—Yes; that sort of uncertainty seldom occurs; we generally, in searches for the Great Roll, have the exact data, the year.

In consulting the King's Bench Records, the applicant calls at the Temple,—states the object of his search—which is hunted for by the officers: he is desired to call the next day, when he is conducted to Chancery Lane. If any circumstances arise which make it desirable to see the imperfect docket books made to serve as substitutes for an Index, off he goes to Westminster.

In the mode of consulting the Augmentation Office Records during Mr. Caley's lifetime, may be seen the total inefficiency of the Record Commission, for promoting public convenience. Any one desiring to consult a record, visited the Augmentation Office, Palace Yard, Westminster;—he might or might not find at the Office, a domestic of Mr. Caley's, by whom he was sent to Mr. Caley's private

house in the *terra incognita* of Exmouth Street, Spa Fields. Arriving there, he might or might not find Mr. Caley at home. When informed of the search, Mr. Caley, after the delay of a day or two, ordered his man to bring the records from the repository to Spa Fields. Though Mr. Illingworth had reported these facts to the Commission, in his observations printed by them, this system received no amelioration.

With respect to the security and aptitude of the repositories, not one (hardly excepting the Tower) is fire proof; and not one can be instanced as a suitable building. We quote a few picturesque descriptions:—Lord Lyndhurst says, (8192,) “ I think the Rolls Chapel a very bad place of deposit. On a dark day you cannot see the records without a candle; you walk and climb through very narrow passages, and it often takes a considerable time to find a record; nothing can be more incommodious than that place of deposit.” Lord Langdale, noticing the records in the same repository, says,—“ They did not appear to me in a situation in which records ought to be kept; they seemed, at least some of them, to be exposed to considerable variations of temperature, which I understand to be injurious to records; and there are many of them in a situation of very inconvenient access, a situation in which public records ought not to be; placed in closets or places, some of them at a great height, and others entirely dark; there are a quantity of records in closets so dark, that you cannot see them as you walk in; there are others in closets so high and with so narrow a footing for a ladder, that mounting to the top cannot be convenient, if quite safe, which I should scarcely think it to be. Those who are perfectly familiar with the dark closets may go in and perhaps pitch upon the record wanted, not always without error I apprehend, but that is the way in which they are preserved. I think it extremely inconvenient.”

In the Pipe Office, the records are kept in vaults two stories under ground, which should be placed under the custody of the Geological Society, for therein grow fine specimens of stalagmites and stalactites, formed by alternations of dryness and dampness.

7074. (Dr. Bowring to Mr. Panton.) Do you ever allow an inquirer to accompany you to the vaults?—Yes; whenever

any gentleman wishes to go to the vaults, we have no objection, if it is his wish.

7075. Then two candles are introduced instead of one; is it not so dark that it is necessary every individual should have a candle, even to find his way through the passages?—Persons may do so; I do not know it is actually necessary for each person to take a candle; I think if *two persons followed the one who had a candle, they would be able to find their way.*

7076. Is it not so completely dark, that it is almost impossible for any person to find his way out of the vaults, if at any considerable distance from the doors—Yes; for the frames on which the records are placed, are in the centre; you are obliged to go round, and it would be rather a circuitous route to get out; there would be some difficulty.

The Exchequer Miscellaneous Records are kept in “cells with unglazed windows, (*Agenda*, p. 367,) on the ground floor in the Western Tower of Westminster Hall,” and in the hay lofts of stables.

As regards order and method:—Out of the whole mass of public records in the metropolis, the contents of one solitary Office (the Tower), are alone in arrangement. Even here it might be improved. The evil consequences of the neglect of this arrangement are manifest, both as regards the administration of justice and the publications of the Commission. Documents of the highest legal value are not forthcoming—or appear by accident. “Certainly,” says Sir Charles Wetherell, (Ev. 6001,) whose testimony is corroborated by all the witnesses of real experience,—“Certainly there is considerable expense and great hazard in making a search for documents that may be wanted, and finding them out.”

Sir Charles is afterwards cross-examined by Sir Robert Inglis, a member of the Committee—thus

6004. “If there were any confusion in the offices with respect to the records, do you or do you not think that in the course of your professional life you would have been cognizant of such confusion; it being assumed in the question, that the confusion is to such an extent as to impose practical difficulties in the way of searches?—That has occurred. I happen to know one of the most curious and important documents in this kingdom, which is the deed or

"instrument by which the property of the Duchy of Cornwall
 "was identified, was found somewhere in the Exchequer, in
 "a place where it ought not to be, and among documents
 "with which it had no connexion. I say this without mean-
 "ing to imply more than that this had been an accident.
 "There is a confusion in some places which may be stated
 "without imputation against any person—I mean, that in-
 "dexes of the nature I have alluded to are wanted."

The Vice-Chancellor is thus examined by Sir Robert Inglis:—

6666. Has it ever occurred to your Honor to have met with complaints of the want of access to records, or of the difficulty with which searches are made, or of impediments in the way of obtaining copies for ordinary use?—I have heard, constantly, of the difficulty of ascertaining where the records are; I have known of cases where searches have been desired to be made, and Mr. Caley, a very great antiquarian, has stated the difficulty he has found in ascertaining where certain records were, and other persons as well.

6669. If there had been any confusion in the offices, which confusion prevented proper access to the records contained in them, is it likely that this would have become known to your Honor?—It has, in fact, been made known to me that there has been great difficulty in ascertaining in particular places which were supposed to contain records, where the records were, and after search they have been found. It appears to me, that the matter ought so to be contrived that any person ought to be able to tell, with very little labour, whether a record is or is not kept in any repository.

"I think," says Mr. Joseph Parkes (Ev. 4385) "a great deal of inconvenience results from the scattered state of the records." "In many matters of professional inquiry, it is difficult to discover in what office to make the search." In some offices, he thinks "it was impossible to find five per cent. of the records." (4387.) Lord Lyndhurst states (8202), "a great deal of time is often spent in searching for a record." Mr. Illingworth specifies the accidental discovery of some instruments, after looking through "bags of unsorted records" (943), which established the rights of the Corporation of

"Bristol to all the tolls upon shipping coming in and out of the port."

We need not search far for evidence of the effect of this state of confusion on the record publications. Their imperfection from this cause is indisputable, and has been perpetually brought to the notice of the Commissioners. Lamentations have been loud, but they were empty sounds, productive of no result. In the second page of their *Agenda*, the Commissioners state that, by searching in a single office, "in the course of a few weeks, they have had the mortification to discover documents that furnish the most lamentable proofs of the imperfections that pervade some of the best publications of the old Boards."¹

Most perfect order and method amongst the records being secured,—the use of them would be much narrowed, unless means of reference through ample calendars and indexes were provided. It must be self-evident, that no satisfactory calendars could be made until the contents of the offices were sufficiently methodized. We have already shown that this primary business of arrangement has not been performed in a single repository, and we need scarcely add, that during thirty-six years, not one single efficient calendar or index, even to a portion of the records of any repository, has been provided by the Commission.² In excuse, it is stated, that "rough estimates of the expense convinced the Secretary that it was useless for the Board to attempt to form calendars and indexes to the records even in the principal offices."³

¹ An attempt was made before the Committee to remove this awkward admission (App. B). How successfully one instance will demonstrate. In the *Agenda*, p. 12, the Commissioners specify that "the discovery of the Registers of the Parliaments of Scotland from May 1639 to March 1650, in the State Paper Office, makes it indispensable to cancel vols. 5 and 6 of the Acts. It is calculated that the newly discovered matter will fill 2278 pages." The editor of these Acts, Mr. Thompson, corroborates the statement. In the face of these assertions, the Committee was told, "there is no reason to expect that any researches in the offices in London will establish a charge of imperfection against the Scottish publications."—(App. B. p. 745).

² Perhaps the MS. Index to the Decrees and Orders of the Court of Augmentation in the Exchequer may be instanced. It is a most imperfect and comparatively useless production. Its execution was ordered by Mr. Caley, chiefly to facilitate searches in his own office.

³ These estimates appear to have been so "rough" that there is a difference of

(Ev. Cooper, 1077). The imperfect calendars which exist, are for the most part the private property of the record keepers, consultable only on payment of heavy fees,¹ and the only alteration which has taken place whilst a Commission has existed, to provide calendars and indexes, has been, that some public and many private indexes have "passed by sale" into the hands of private individuals, and been thus lost to "the public." It is at the present time, as Mr. Baron Alderson says (7675) it used to be, "a monopoly to have the possession of a good index to the records."

A most conclusive and irresistible exposition of the positive evils arising from the absence and the imperfections of calendars is afforded by the evidence of Mr. Hewlett; we shall conclude this subject with some illustrations afforded by the actual experience of witnesses.

Mr. Hodgson (now Hinde), M. P. for Newcastle, states (3364), that in consequence of the defects of the calendars at the Rolls Chapel, he failed to discover a document of the greatest importance, whereby he sustained an irrecoverable loss of between 400*l.* and 500*l.*; and Mr. Hewlett gives valuable details of delay, vexation, and expense, lately occasioned by the absence of indexes to the records of the Court of King's Bench. (554.)

"After long and tedious proceedings," (says this gentleman, 557), "It was afterwards accidentally discovered, that the matter in dispute had been before the courts of law on several occasions in early times, which gave an entirely different complexion to the case. My client had not the full benefit of this new evidence, as a compromise took place between the parties. If the existence of these verdicts had been known in an earlier stage of the proceedings (as they must have been if there had been an *index locorum*

340,663*l.* between the estimate of the Secretary and that of Mr. Hardy, for providing calendars to the Tower Records.

¹ "I was employed, says Mr. Hewlett (762), within this month, to inquire into some charity lands at Paddington; I wished to consult the references to those (the Petty Bag) records, but the fee was five guineas, and I was rather limited as to expense. I left it to the parties, whether they wished me to pay this fee of five guineas; they declined it. It is impossible to say whether these records might not have given me more information than any other documents I could refer to."

"to the Verdict Rolls), I should have shaped my course differently, and in all probability an expense of 1500*l.* would have been saved to the parties."

Mr. Cooper, alluding to Mr. Hewlett's Evidence says, (p. 214,) "I shall be able to show that what that gentleman has said respecting indexes to certain records, and the inconvenience arising from the want of them, applies to a state of things which has now ceased to exist." If able, Mr. Cooper certainly failed, for we cannot find that he made any attempt, unless his bringing Mr. Grimaldi forward as a witness was intended as one.—Mr. Grimaldi being asked, "What is your opinion of the propriety of compiling calendars to the later placita of the King's Bench, Common Pleas, and Exchequer, up to the time of the Union; would their usefulness and importance justify the expense?" answers, "That it is very highly important" (6517.)

The interests of the legal profession were treated by the Commission with something approaching to contempt. Mr. Allen says (7377), "As to the practice of the law, I know nothing of it whatever, and if the Board had been confined to such objects, I should never have allowed myself to be made a member of it." He is asked (7333), "Are you aware of the evidence which has been given before this Committee with respect to the records of the King's Bench and Common Pleas?"—"I have read part of it, but upon that point I can say nothing." Imperfect docket-books furnish the only means of reference to the records of the Exchequer of Pleas. These are in great confusion (Hewlett, 625). But Mr. Cooper, though a lawyer, has no sympathy for the wants of the profession. He says (1822), "It would, in my judgment, be to throw money into the river, to make calendars or indexes to those records." Again (2198), "In my humble judgment, the money applied in procuring these historical materials from the libraries and archives of the Continent, has been employed not only in a manner more conformable with the object of the Commission, but in a way more advantageous to the public (always supposing that history has its value), than if it had been spent in *making indexes to writs of latitat, capias, and quo minus.*"

The subject of fees alone remains to be noticed until we

come to the real source of all the mischief: the irresponsible custody to which the records are exposed.

We need not now discuss the principle of fees, or the scandalous injustice of denying rights to the poor man; or the selfish motives created by fees in hostility to expeditious administration; or the fallacies involved in the assumption, that the payment of them checks vexatious litigation, and promotes the security of the records. Their present condition gives a melancholy denial to the latter pretence. We shall not soon forget the impressive dignity which accompanied the delivery of the following opinion to the Committee by Lord Langdale. (Ev. 4496.)

“ I consider that to check litigation, by means of expense, is pernicious to the public. Litigation may be most usefully prevented by cutting off its sources; but if the causes or sources of litigation are existing, the only mode of preserving the peace of society is to allow litigation to take place, and to make it easy. It is a great object of good legislation to cut off the causes or sources of litigation; that I conceive to be the object of government; but when the sources of litigation unhappily exist, instead of allowing them to rankle and fester in the minds of parties, the best and most prudent course is to let them go before an impartial judge, who may decide the matters in difference between them, and this is litigation.”

No language (states the Report, page xxiv.) that your committee could employ, could too strongly condemn the monstrous injustice and impolicy of imposing these additional burdens on those who have the misfortune of having legal rights unjustly withheld or menaced; and who are already, from accident or the defects of our law, exposed to the unavoidable expenses and anxieties of litigation. The operation of these evils appears to be most extensive. Frequent recourse is had to these documents in the course of legal proceedings. In many instances the search is to be conducted at hazard, through records of different classes, extending over a long period. For every different document, and every different period, a separate fee in most instances is required; and if in order to diminish the labour, uncertainty, and cost of such a search, the inquirer can have recourse to a calendar or index, that calendar

"or index generally turns out to be private property, and is made the means of exacting an additional fee. Fees of an inordinate amount are demanded for producing records before the two Houses of Parliament from the parties who may have occasion to use them. Fees of disproportionate extent are demanded for every copy of these documents which it may be necessary to procure before the other tribunals, or for the satisfaction of the parties; and lest this charge should be evaded by the personal diligence of the inquirer, or should not amount to so much as may satisfy the expectations of the keepers, in most of the record offices no person is allowed to make the copy for himself; and at the Rolls not even a memorandum, nor a copy of only such portion of a record as may be useful to him, is allowed. In all cases he must pay the officers for making the copy, and almost always for copying more than he needs." . . .

"To inquire into the mode of remedying this great abuse of fees, and into the regulations and establishment of the various offices, was the one new object,¹ (in addition to those which had been assigned to former commissions,) for the furtherance of which the present Commission was constituted. It appears, however, to your Committee, that no effective power of interfering with the present regulations of the offices, or of diminishing the fees, has ever been given to the Board. To recommend reforms, and to obtain sufficient powers for executing them, was indeed all the Commission could do; and this it has certainly failed to effect." * * *

"In consequence, the fees remain as they did before at the

¹ At a Board held 30th June, 1832, notice appears of a Committee to make inquiries; "the prosecution of which inquiries, the Secretary was informed by the Lord Chancellor, was the *principal object* of the New Commission (*Agenda*, p. 7);—"But when it was contemplated to form a Committee or Committees, it occurred to some one, I think," says the Secretary (Ev. 1091), "to Lord Brougham himself, that almost all the most material objects had been attained by the Royal Commissions issued in the year 1816," and the Committee was never appointed. Lord Brougham "informs Mr. Cooper (7925) that it was Sir John Leach who stated that such Fee-Commissions had effected all that was proposed to be done by one or more Committees of the Record Board." By a return (App. F. 1) it appears neither Lord Brougham nor Sir John Leach were present at this Board. "So that," states a note in the 8vo. edition of the Report, published by Ridgway, p. 41, "the suggestion could not have proceeded from Lord Brougham, according to Mr. Cooper, or from Sir John Leach, according to Lord Brougham."

"principal public offices, and any improvement which may have taken place is to be attributed to the keepers, and not to the Commission."

Every body protests against the fees. Lord Lyndhurst bears testimony (8201) that "Statements have been made that the expenses of fees were very heavy." The Vice-Chancellor (6668) "has always heard it stated they were very great." Sir Edward Sugden (7991, &c.) suggests improvements. Sir Charles Wetherell speaks (6001) "of considerable expense" in searching. Sir Harris Nicolas (3946) thinks them "a scandalous abuse, which ought long since to have been re-scinded."

"The system of fees seems to me almost to amount in some instances to a prohibition to search," says Mr. Hewlett, (660), and he enters into minute specifications of payments of fees at the Rolls, Tower, &c. Mr. Grimaldi thinks (6549) it "a very great evil that suitors are exposed to such fees;" and he shows how they retard justice.¹

With respect to history, the Report (p. xxv.) proceeds: "In many of the offices the fees bear equally heavy upon those who consult the records for historical and antiquarian purposes. In some offices, your committee has been informed, that they are wholly or in part remitted. Even where this remission takes place, it is the act of the keeper, and must lay the person benefited under a personal obligation to him; and the access, where not closed by fees, may thus be granted or withheld at the pleasure of an individual."

Among the historical inquirers complaining are Dr. Lingard;

¹ "The parish of Pailton instructed me to make a search for a charter granting them rights of common, but their solicitor could give me no date as to when this charter was granted; it was my intention to have searched the rolls from the time of the dissolution of the monasteries, (calculating that it was probable the property was a monastic possession,) till I found it. I wrote to the solicitor that I should have to pay 1s. per year, and if he gave me two or three names of parishes, that it would be more; that is, if I searched for three parishes, 3s. per year. I should have had to search, if the occasion required it, through the reigns of Henry the Eighth, Elizabeth and James, and the intermediate reigns; that would have embraced a period of nearly one century, for which I should have to pay nearly 15l. When I informed the solicitor for the parish of this expense, he said his parishioners were *too poor* to pay it, and they went to trial without the search being made." (Ev. Grimaldi, 6533.)

Sir Thomas Phillipps, who calls (7487) high fees in certain offices "a great impediment" to inquirers; Sir H. Nicolas, (*Ev. passim*); Mr. Tytler, (4267), who says, "abolish fees; expel Mammon who keeps the door;" Mr. Nichols, (5853), who found the fees "a great impediment and annoyance;" and others. Sir F. Madden wrote a letter to the Commissioners complaining of the fees, but they took no notice of it (5537).

In refutation of all this testimony, the Secretary to the Commission (1765) "in order that all doubt may be removed "as to the supposed necessity of the Commissioners taking "immediate steps to reduce the amount of such fees,"—"made a short statement with the view of showing them to "be moderate."¹ (p. 214.)

All the evils of the present system, accurately defined by Dr. Lingard (*App. p. 730*) to consist "in the dispersion of the "public offices, their inconvenient structure, want of arrangement, absence of copious indexes, and exaction of fees," may be traced to a single cause—the imperfect and irresponsible custody to which they are subjected.

Had the Commissioners done what indeed they had no direct powers of doing, had they removed disorder, and provided good means of reference, their labours, so long as the present custody remains, would have been but temporary palliatives. We find this to have been the case where the Commission put records into order. No security was provided to preserve it, and the records fell into confusion again. (*Report, p. xix.*)

A few words will show what the custody is. The supreme controul over the records is vested in the several Courts, and the Treasury. The functions of the officers anciently superintending the custody of records have become changed; and the business being swamped by other occupations, has fallen into neglect. A Master of the Rolls originally was the officer his name imports, "a Master of Rolls." Now the custody, though nominally remaining with him, is a very subordinate

¹ Three years before the Secretary had reproached himself, "that although almost "two years have elapsed since the present Commission was issued, yet no proposal "has been brought forward to effect any amelioration under the head of 'Establishment and Duties of Office and Fees.'" (*Agenda, 105.*)

duty, and it would be preposterous to blame any Master of the Rolls for neglecting to pass the hours not devoted to his judicial duties, in superintending the arrangement, reparation, or indexing of the Chancery records. The judges are likewise the legal custodes of the records belonging to the several Courts. No one in particular is responsible for the performance of the duties. What Baron of the Exchequer is answerable for the sale of records¹ in the King's Remembrancer's Office, or the loss and spoliation committed by soldiers and labourers when the records were moved in 1822?² Is Lord Denman blameable, because a record was cut away from the file to suit the convenience of the copyist, and subsequently lost, when required on a trial so late as 1833?³

We shall not find the actual custody at the principal offices, supplying the defects in the supreme controul.

Of what practical use can the controul of the Treasury be, when Sir F. Palgrave claims to hold the Keepership of Records at the Chapter-House as a sinecure? He tells the Committee "he wishes to have it upon the minutes distinctly, that if he chooses he may claim the right to receive 400*l.* a year for one day's attendance." (4158). And this claim was made when scarcely two years had elapsed since the Treasury by its warrant (printed in App. L. 3, p. 892) defined his duties in the following words, "To sort, digest, and methodize the records, papers, and writings, and to make proper calendars;" and, moreover, commanded him to report his progress every quarter.

At the Rolls Chapel the keepership is another sinecure; and it must have been so considered when Sir John Leach bestowed it on his brother, a gentleman whose previous occupations, as a manufacturer, were quite foreign to records. The business of this office is consequently left to a deputy. At the King's Remembrancer's Office, Exchequer, unlimited and uncontrollable access to the records is shared by thirty-three persons, exclusive of the Barons and the King's Remembrancer. He states (1720), "that where the custody is par-

¹ Cooper, 2157; Vincent, 1722; Cole, 4649, 4925.

² Report, p. xxvii.

³ See Mr. Rogers' Evidence, p. 63.

“tain degree nominal.” Mr. Vincent reported to the Commission (*Agenda*, p. 70), that when he became Remembrancer, “I found that the books and records of the Exchequer, instead of being collected in one solid, substantial, dry and well-watched building, commodious for reference, hourly accessible (within certain limits of time) to the public, subject to the controul and guardianship of one responsible official individual, who might make himself master of their character and tendencies, and take measures both for their safety and general utility, were scattered in various places and various custodies ; at various distances and with various pretensions. Some were kept by the First Secondary, some by the Second, some by the King’s Remembrancer himself at his chambers, some were supposed to be in the keeping of individuals, some to be missing altogether, some were at Westminster, some in the Temple, most in places exceedingly ill adapted for their preservation and security, and inaccessible, for the most part, to the public without great trouble, difficulty, and expense.” Though Mr. Vincent suggested to the Commissioners the propriety of assigning the guardianship to one official head, they paid no attention to him (1719). He constantly reminded the Treasury and Government of this necessary step (1707), yet nothing was done. Even thus burthened with the custody of tons of unarranged records, a recent Act of Parliament (3 & 4 Will. IV. c. 99) positively imposed on him the additional charge of the Lord Treasurer’s Remembrancer’s, the Pipe, and Augmentation Records. The custody is virtually conducted by very subordinate agents. Indeed the keepership of the Augmentation Office is exercised by the “domestic servant” (782) of the late Mr. Caley, “a very honest sort of man, with a very large family” (Illingworth, 983), “who cannot read Latin, much less copy it.”

It has been an amusing, though an expensive sight, to watch the great Law Reformer placing judges on the Record Commission in order to remedy, as Commissioners, their neglect of records as judges.¹ That Noble Lord must have

¹ Here is an illustration of the use of the united efforts of Commissioners and Judges (Ev. Cole, 4440). “The Commissioners, in their Report in 1812, congratulate themselves that some orders have been ‘provided for the more regular ‘keeping of the records’ by the Barons of the Court of Exchequer; but the ‘complete inefficiency of those orders, and the way in which they have been treated

reasoned, that as they had no time and inclination to act as judges, by nominating them Commissioners, they would find both. The state of the records, and the number of their attendances at boards, prove this fallacy.' Throughout the inquiry the judges were used to serve as stalking horses for the inaction or neglect of the Commission.

592. Sir Robert Inglis to Mr. Hewlett.] In point of fact, the custody of the records of each court is with the court to which such records belong?—Exactly so.

593. The *Chairman*.] Have the judges much leisure for arranging these records?—Very little.

594. Do you suppose they would do it if they had?—I should think they would be jealous of preserving their records in good order, if they had time and means; there are no funds to arrange them within the judges' controul, that I know of.

594. Do you think if it should be established, to the satisfaction of the committee, that the only persons qualified to arrange them are the judges, there is any chance of their doing so?—I should think not.

Nothing having been done at the Exchequer of Pleas, the Secretary remarks (1822), "Mr. Baron Parke is one of the Record

"by the office, is exceedingly remarkable in every point of view. One of the orders is, that the 'court-keeper do not deliver out the keys of the record rooms to any person whatever except to one of the clerks in court, accompanied by the bag-bearer.' Now, it happens that the court-keeper has no keys to deliver, or if he has, he does not deliver them; and that the person who keeps the keys is the bag-bearer, and not even the side-clerks, to whom the Barons order that the keys be delivered. Another order is, that the bag-bearer should not make 'any search without the presence of a clerk in court;' but a contrary practice must be well known to every person who has had occasion to make the slightest search in these records; the majority of searches are made by the bag-bearer alone. Another order is, that 'a public book should be deposited in one of the record rooms, in which the title of every record removed out of the record rooms shall be entered by the clerk in court who removes the same;' there is no book kept to the best of my belief, and every record is removed according to the pleasure of the bag-bearer of the court. The fifth order is, 'that they do not place any records in any press in the record rooms under lock and key.' The fact is, that both secretaries of the office keep each a press in the Stone Tower under lock and key, and do not admit the public to have any access to the records deposited in those presses without payment of some additional fee."

¹ By a Return, it appears that not a single member of all the twenty-five Commissioners attended every board held in five years. Mr. Baron Parke attended eleven, and Mr. Justice Bosanquet fourteen boards out of the thirty-eight held during that period. Mr. Baron Parke attended two, and Mr. Justice Bosanquet eleven committees out of fifty-three. Even this is more than could reasonably have been expected from either of these distinguished judges.

“Commissioners, and he has never suggested that the attention of the Board ought to be directed to any such office.” At the King’s Bench, the Secretary accounts for the non-interference of the Board, by saying (1789), “The judges, if they perform their duty, might, not without reason, consider the interference of the Record Board as meddling or impertinent with reference to records daily resorted to.”

No further demonstration can be necessary to prove, that until the present custody of the records is wholly changed and reformed, no improvement can be permanent.

Mr. Allen, a Commissioner, thinks a change in the custody “would be a hazardous experiment to try.” (7336.) We leave Lord Lyndhurst to explode this timid gentleman’s apprehension.

Lord Lyndhurst recommends “one custody, if possible,—and thinks it very immaterial whether the records are in the immediate custody of the judges or not.” (8195, 6.)¹

It was a great mistake to expect the work of reformation to be accomplished by a numerous unpaid Board, composed of individuals wholly engaged with other official duties, of lawyers in full practice, and literary *dilettanti*. And it was still more absurd to direct these Commissioners to act, without giving them sufficient powers to do so. The preamble of a legislative enactment, which is requisite to effect any reform, will tell the same story, after an expenditure of half a million sterling, as the address of the House of Commons in 1800. “That in many important offices the records are wholly unarranged, undescribed, and unascertained; that some of them are exposed to erasure, alteration, and embezzlement, and others lodged in places where they are daily perishing by damp, or incurring a continual risk of destruction by fire.”

The report of the Select Committee recommends:

1. The erection of a general repository.

¹ Mr. Allen offers a scheme for modifying the constitution of the present Board. He seems hardly to dream of the want of arrangement and calendars, &c., in almost every office. He instances one office—the Augmentation Office—(which, excepting the Chapter House, we wager is the only office he ever entered) as requiring “the labour of several years to reduce to order the unarranged records.” (Ev. p. 633.) This is a very good specimen of the state of Mr. Allen’s information. Belonging to the Augmentation Office, there are no unarranged records worth mentioning. A month’s labour of a competent person, would accomplish all left incomplete when the Commission suspended the arrangement.

2. The dissolution of the present Commission.

3. One paid keeper, or Board of no more than three persons, to be invested by the legislature with control over all the records, and powers to methodize, &c.

4. For the purpose of publication of records, other persons to be united with this Board in a separate Commission.

We have no space to discuss fully these proposals, or the modifications which appear necessary in Mr. Allen's scheme for a fresh Commission.¹ Our own opinion is, that the first business to be done, that of universal arrangement, is not one requiring any Commission at all, but the services of an efficient salaried inspector, invested with the custody.

We would pass an act for a general repository²—and at the same time appoint a paid general keeper. He should

¹ The first sentence of Mr. Allen's scheme is as follows:—"I consider the Record Commission to be a Board of Commissioners nominated by His Majesty, for the purpose of inspecting and inquiring into the state and management of the record offices, and other repositories for public records and papers, throughout the kingdom; *for reforming the same as far as their powers extend*, and where their power is deficient to report thereon to the King in Council; and to recommend such alterations and improvements as to them shall seem necessary or expedient."

Suppose the Commissioners to have done these things—"reformed as far as their powers extend, reported their deficiencies, and recommended alterations"—will not Mr. Allen admit the necessity of the reforms going a little farther, seeing the little extent of their powers; and likewise the importance of acting on their recommendations? But the fact is, Mr. Allen stops here, and does not point out how ulterior measures are to be accomplished. After thirty-six years they have effected no reforms, and recommended no alterations. Would Mr. Allen still wish to proceed in the same course as heretofore, at an expense of 10,000*l.* a-year?

² The Commission prepared a bill of a most extraordinary nature to establish a general Record Repository. The idea of it was stolen from Mr. Illingworth,—(Ev. 845, &c.) The bill invested the Commissioners with certain powers, but omitted to constitute the Commissioners a permanent body. It attempted to abstract funds for the building from the Suitors' Fund in Chancery. The Accountant General thus remonstrated against this proposal.—(p. 76, Papers, General Record Office.) "I cannot see why the Suitors in Chancery are to pay for these public purposes rather than any other class of the king's subjects; nor why a Record Office is to be established at their expense more than any other public institution. If the public requires this accommodation, why is not the public to pay for it?" In this opinion, Lord Langdale fully concurs.—(Ev. 4515). "One clause (p. 64, *ut supra*) enacted that the records, of what nature or kind soever, contained in the Augmentation Office and Chapter House, shall be considered as records of the Court of Chancery." Acts of parliament are omnipotent, certainly:—Exchequer, King's Bench, Parliamentary and Star Chamber Records, all in an instant metamorphosed into "Records of the Court of Chancery."

have the custody of all records of a certain date, and, with the sanction of the Treasury, should be enabled to obtain proper assistants to produce good order among the records. The judges should periodically inspect and report upon the state and progress of the arrangement. Until this was effected all printing should be suspended. The sinecures of the Chapter-House, Rolls Chapel, &c., to be immediately abolished: compensation or employment to be given to the present incumbents.

We have ample experience that the superintendence of the operations of arrangement and calendaring will not be performed by a gratuitous agency. If the public pay Sir F. Palgrave 400*l.* a year, he claiming the right to render no services in return, and Mr. Leach 700*l.* a year for doing nothing, no complaint on the score of economy could be raised against providing efficient guardians over all the records, with the funds now devoted to these sinecures.

A general repository, though it should cost 100,000*l.*, would be a measure of economy. Thirty thousand pounds have been expended in bad and temporary repositories for the Exchequer Records alone, since 1800. The government has no option about the immediate necessity of providing repositories for the Records in Carlton Ride, Somerset House, and the Rolls House. These records require 11,290 feet of space; whilst the space required for all the records would not exceed 24,000 feet.¹

The Report of the Committee states: "Projects for the erection of a General Record Office have been at various times considered by the Board. No such plan has, however been carried into effect. A great many meetings were held and reports made, and a bill was prepared, which Mr. Allen tells your Committee was either not brought into parliament or not persevered in; and the matter, as he stated, was allowed to drop; not, it would appear, on account of the opposition justly excited against it, by reason of its proposed misappropriation of the 'Suitors' Fund, but owing, as Mr. Allen says, 'to a mere accident,' of which the nature has not been explained." Lord Brougham was so pleased with this scheme, that he said he would make it a "cabinet measure."—(Ev. 848). The best authorities—Lords Lyndhurst, Langdale, Mr. Baron Alderson, &c., quite agree in favour of such a measure; though not of such an abortion as that proposed by the Commission.

¹ Papers—General Record Office, p. 40.

ART. VI.—THE REVISING BARRISTERS AND THE NEW COURT OF REVISION.

1. *A Letter to H. Warburton, Esq. M.P. on his Proposed Alteration in The Registration of Voters.* London. 1836.
2. *The New Bills for The Registration of Electors critically Examined, &c.* By John David Chambers, Esq. M.A. of the Inner Temple, Barrister at Law. London. 1836.

A BILL passed the House of Commons late in the last session of Parliament, having for its principal objects the settlement of sundry doubts that had arisen on the construction of the Reform Act, and the replacing of the present floating body of revising barristers by a permanent tribunal,—to consist of ten constantly perambulating the country, and a chief residing in town, who, from his central position, like the governor in Jeremy Bentham's Panopticon, was to exercise unlimited control over the movements of the others, and decide all questions of appeal. The Lords, on the motion of Lord Wharncliffe, struck out so much of the bill as related to the new tribunal, and made some judicious improvements in the rest. The Commons, consequently, refused to pass it, and it failed. The object of the following remarks is to show that, as usual in late cases of difference, the Lords were entirely in the right and the Commons entirely in the wrong.

The supposed necessity for a new tribunal appears to have originated in complaints brought against the revising barristers, who were ferociously attacked in the newspapers upon charges, most of which would probably have been adduced with equal justice against any body of judges (not excepting the highest) on whom the duty of interpreting any new Bill of equal extent and importance, much less a Bill containing so many ill-drawn and perplexing provisions as the Reform Bill, had devolved. Be this as it may, we are quite sure that Lord John Russell's new Council of Ten, placed in precisely similar circumstances, must have made themselves obnoxious to precisely similar objections, besides sundry others peculiar to themselves. But it was not Lord John Russell's intention to place them in similar circumstances. They were to have the benefit of a declaratory law, and an appeal court; and they were to be invested with powers of summoning witnesses, compelling the production of documents, fining over-

seers, awarding costs, &c. Lord Wharncliffe, however, was equally ready to pass the declaratory clauses, to provide a better appellate jurisdiction,¹ and to invest the revising barristers with the powers intended for their substitutes by the ministry. In comparing the respective schemes, therefore, the principal question for consideration is, whether a permanent body appointed by the government would be likely to do the work better and more to the satisfaction of the public than a floating body appointed by the judges.

In the first place, it stands beyond a doubt, that the advantages of cotemporaneous registration would be lost.

"To estimate the amount of these advantages (says the author of the able Letter to Mr. Warburton,) "we have but to look at the evils of the contrary practice. It is, I doubt not, known to you, that as far as the experience of four years can guide us, we must assume that, during periods of political tranquillity, neither the Conservative, nor the Liberal party, more especially the latter, is inclined to undertake watching and checking the electoral lists. It is only when agitation runs high, and the prospect of a change of government, or dissolution, is vivid and immediate, that men will incur the toil, the expense, and the personal offence of such a task. Let us suppose, then, that a certain temporary repose has succeeded past excitement,—the registers have, in consequence, been neglected, and are become inaccurate. In one place, a tory; in another, a radical attorney, of more energy and impudence than his fellows,—each aided, perhaps, by a sympathizing overseer,—has succeeded in turning the scale to his wishes, by expunging good, and foisting in bad votes. In most places, however, the current of events alone has materially vitiated the lists. Suddenly a great measure of reform is introduced: the Lords, as usual, rebel, and there is to be another trial for a Tory Ministry, backed by a Tory Parliament. Your Revisors, at the moment, are revolving in their several orbits. The lists thenceforth submitted to them, until the general election takes place, are anatomized with such skill and care on both sides, that the fortunate places they belong to are enabled to return Members to Parliament

¹ By the amended Bill, the appeal was to be by way of special case, to be signed on application by the barrister, to the judges of the superior Courts of Law at Westminster. Questions of law were to be the only subjects of appeal.

representing the true sense of their electors. But how differently fares it with those places the Revisors have left behind them. In many of them a member is returned obnoxious to the real majority. In all there is a prevalent opinion, that had the real sense of the constituency been ascertainable, the result might have been different. They curse the accident which made their next registration so distant, and abuse the law which enables such an accident to place them in so much worse a position than their equally negligent neighbours in this county or that borough."

But then the work is to be done in so superior a style as fully to compensate for these disadvantages. We entertain no expectations of the kind, and the slightest knowledge of the state of the profession might have saved other persons from the folly of entertaining such. The period of the year appointed for the revision of the lists under the present system is fortunately one when there is a good deal of legal talent and experience unemployed. The consequence has been that barristers of a much higher class than could reasonably have been anticipated from the amount of pay, have been induced to accept revisorships. But no inference can be drawn from this circumstance in favour of the supposition, that ten barristers of tried ability can be procured at the rate specified in the Bill. The prospects of a man of tried ability at the bar are worth more than a thousand a year in hard cash, to say nothing of the chances of distinction he is to surrender, and the dull, dreary, harassing, uninteresting, unsocial, unambitious course of life he is to adopt—without any prospect of promotion or ulterior advantage of any kind, without so much as a retiring pension to console him in the evening of his days. This point, again, is strikingly put in the Letter:—

"It is not to be forgotten that the Registration, as now conducted, takes place in the latter part of the long Vacation, at a time when there is no other field open for gaining professional emolument or professional reputation. A revisor under the present system makes therefore no sacrifice, save of his leisure. But a revisor under yours must sacrifice all other prospects. You will, therefore, be unable to command the two sorts of men who make at present the best revising barristers. Even supposing the usual precaution of

requiring some considerable standing at the bar should not be taken, the younger men of ability and promise, who have not yet had time or opportunity to distinguish themselves, and who now desire revisorships chiefly as a means of making themselves known, will not accept such an appointment, because they confidently hope to attain in time to wealth and reputation greater than it can confer. The older men of some practice and experience will not accept it, because they already draw from their professional exertions, with less labour and more credit, an income something like an equivalent, and because, though the experience of but moderate success has taught that the highest prizes of the profession are not for them, they still, if men of character, with reason hope for something better, for a high judicial station abroad, or an inferior judicial station at home. You will have, Sir, to choose only among the older men who do little or nothing, and the younger men who never hope to do much."

It would be invidious to comment on the qualifications of the gentlemen whose names were inserted in the Bill, the more particularly as some of them were named without being consulted, and received the first intelligence of their acceptance of the appointment from the newspapers; but we stand in little fear of contradiction when we say, that the difficulty experienced by the patrons of the measure in procuring recruits fit to stand a scrutiny, and the necessity under which they found themselves of using names without authority, afford ample proof that the argument last stated was based upon an accurate estimate of the views and motives of the bar.

But a still more fatal objection is the suspicion of partiality to which the new revisors would be exposed from the nature of the appointments, which, whether vested in the Premier, the Chancellor, or the Speaker of the House of Commons, would be, to all intents and purposes, political. Indeed, nothing can show this more strongly than the division that was to have been made of the patronage; five of the names inserted in the Bill having been selected by the Whigs and Radicals, and five by the Tories. This was done to conciliate opposition; but surer means could not have been devised for impeding the satisfactory operation of the scheme, for attention would thus have been called to the political opinions of each revisor at starting, and it would be difficult

to make the public believe that their conduct would not be influenced by a circumstance which was deemed important enough to be made the subject of a compromise. Now there certainly are districts in which a very slight leaning would turn the balance ; and it will be remembered that the districts were to be assigned and shifted by the chief, the nominee of the ministry. Consider, too, the utter absence of responsibility under which these ten gentlemen would set forth—

“ But, Sir, (says the writer already quoted,) the grand objection to your amendment is, the comparative irresponsibility of the functionaries you propose to create. To a statesman so able as yourself, and in times so pregnant with warnings on the subject, I need not to enlarge on the paramount importance of securing in all public servants as complete a responsibility as is possible. Now I can hardly imagine any position more absolutely responsible than that of the Revising Barrister as at present constituted. He is responsible to the Judges who appoint him, to whom he looks for future kindnesses, and on whom depends his reappointment. He is responsible to his brethren and rivals in the profession, who do not fail to scan his proceedings with no indulgent eye. He is responsible to the public, who take care to bruit abroad by means of daily and weekly prints, any error or impropriety he may be guilty of. He is responsible to the very attorneys in his district, from whom it is his aim and hope by satisfying them of his capacity, to obtain future professional assistance. In fact, his very existence as a lawyer depends upon his going through his task with honour and credit.” . . .

“ What, Sir, on the other hand, is the condition of your revisors? Beyond that nominal ‘*quamdiu bene se gesserit*’ responsibility, which we all know is nothing in effect, they have but to avoid provoking any vehement indignation in the public. But to the blame or praise of that public, or of their own profession, whether judges, barristers, or solicitors, they will be almost insensible. They have nothing to gain by discharging their task admirably, nothing to lose by going through it indifferently. I confess, Sir, that all the advantages of your scheme do not in my mind counterbalance this evil.”

The writer has here rather understated than overstated the objection. Shelved for life as regards the profession, and with

no higher step in their own peculiar walk to look forward to, it is to be feared that some of these gentlemen might occasionally seek to better themselves by pleasing the ministry of the day, to whom, in critical times, they might do service well worthy of a rich reward. A revising barrister, appointed to a few boroughs or a part of a county for a single year with a colleague, has not the means for conciliating favour in this manner, nor is he very likely to have the inclination, the hopes and wishes of most of his class being ardently and exclusively directed towards professional success. Accordingly, we do not at present remember more than one or two instances in which a Judge has been so much as suspected of prostituting his patronage for party purposes, or a barrister of being warped in his decisions by his politics.' In point of responsibility and freedom from suspicion, therefore, the new revisor would clearly be inferior to the old, and we see no reason for anticipating any material improvement in soundness of judgment or uniformity. It is a mistake to suppose that much legal learning or experience is requisite for the exposition of the Act: hardly one disputed vote in a hundred involves a law question of the slightest difficulty; and if the case were otherwise, we doubt whether a body of men set apart for the purpose, would conduct an investigation principally dependant on a due application of the general rules of evidence, better than barristers conversant with the daily practice of the courts. Serious differences, again, will henceforth be prevented by the operation of the declaratory clauses, and the appellate jurisdiction; but if not, ten would be quite sufficient to create the worst evils of inconsistency, and the inveteracy of conflicting opinions will more than compensate for any slight diminution in frequency. If Mr. A. were to make up his mind to give the widest possible construction to the word *building*, and Mr. B. the narrowest, more doubt would be occasioned, and more real mischief done, than if twenty of the present revisors, during any given year, were to put each his own individual construction on it. Admitting that no two gentlemen agreed out of the one hundred and seventy, it by no means follows, as some of their assailants seem to think,

¹ Great dissatisfaction has been occasioned by the last revision of the burgess lists, on account of the known political and local partialities of the mayor and assessors, and wishes have been expressed in many boroughs that the revision should henceforth (as in the first year) be conducted by a barrister.

there were one hundred and fifty points of difference. On the contrary, we believe that there were not altogether above six or seven material ones.

The expense of the present system has been estimated on an average of years during which the political atmosphere has been more than ordinarily changeable, and the Bill in the most crude and unsettled condition. The Judges, moreover, on some circuits, have inconsiderately increased the expense by making more appointments than were necessary. Allowing for these and other accidental causes of increase, we are convinced that the average expense of future years will fall short of the sum (not less than 16,000*l.* a year) required to satisfy the exigencies of the new Metropolitan Court and the ten new revisors (with their clerks) constantly travelling at the public expense. It must be borne in mind, also, that the number of revisors under the present system may always be reduced or augmented according to the exigency; whilst the new Court, like Lord Brougham's Court of Review, must remain a standing charge on the country till the members die off, with whatever force its inexpediency may be demonstrated by circumstances, and to whatever extent the business may fall off.

We have thought it unnecessary to open the question as to the hands in which the appointments should be placed. The Judges may not have administered their patronage with that uniform discrimination and impartiality which the public and the profession were entitled to expect from them, and a few instances of personal favouritism might be particularized which would tell against our present argument. But, on the other hand, they have uniformly employed their best influence to induce the higher class of barristers to act, and there certainly are no persons in the kingdom so well acquainted with the qualifications of the candidates, or so superior, as a body, to the influence of party motives;—and this, after all, is what it should be the grand object to avoid in the formation of a tribunal, on which, in an easily conceivable emergency, not merely the rise or fall of a Ministry, but the very framework of the Government and the distinctive character of the Constitution, may depend.

We reserve to a future opportunity some comments we had prepared on the other provisions of the Amending Act, and Mr. Chambers' Pamphlet, in which that Act is ably discussed.

ART. VII.—SUGDEN ON POWERS:

A Practical Treatise of Powers. By the Right Hon. Sir Edward Sugden. 6th Edition. 2 vols. London. 1836.

WE have here an old and esteemed friend in a new dress, two volumes instead of one, with many alterations as well as additions; but as the learned author has also favoured us with a new preface we cannot do better than let him tell his own tale :

“ At the close of the preface to the first edition of this work, the author pleaded, as an excuse for the inaccuracies in it, the necessity of devoting his time to other labours, from which moments were snatched for this performance.

“ More than a quarter of a century had elapsed since that apology, when the writer suddenly found himself, for the first time, in possession of leisure. After some relaxation, not unmindful of the debt which he must ever owe to his profession, he determined to review this book, and he has done so to the exclusion, for a considerable period, of all other pursuits. He must now trust to some other apology for his errors; but he may be allowed, in fairness to himself, to say that nothing has been spared to render the work correct and complete which unceasing labour, devoted to a favourite subject, could accomplish.

“ This work, in its original state, might be considered as a textbook, in which an attempt was made to deduce the rules from the decided cases. The plan has now been enlarged, and the leading cases are stated succinctly and examined, so that the practitioner will be enabled to collect, in a comparatively short time, the facts of the principal authorities; and the writer's observations upon them will at all events afford materials for reflexion. He knows, by a long experience, how useful this will be in the pressure of business, if the execution of this portion of the work at all justifies the time which has been bestowed upon it. He regrets that he has upon so many points differed from persons for whom he entertains unfeigned respect, but he has rather considered the principle of the rule than the weight due to the authority by whom it was pronounced; and his own erroneous impressions may readily be corrected, for it is but in few instances that he has given an opinion without stating the reason upon which it is grounded.

“ The page of text has been enlarged, but still the additions,

which include all the recent cases, are so extensive as to render existing references to the book no longer useful, and the writer therefore has not hesitated partially to alter the general arrangement, where he deemed it an improvement. He has divided the work into more chapters and sections, and has numbered the paragraphs, and prefixed to each section a table of its principal contents; he has likewise taken great pains with the general index. He has endeavoured to correct and clear up whatever in the original work his own observations or the sagacity of others has pointed out as erroneous, or even ambiguous; and he has throughout been animated by an ardent desire to improve this important branch of the law of real property, to which his attention was directed early in life; and he believes that a series of treatises written with this object, would with such corrections as the Legislature only can make, and which can seldom be well directed unless a comprehensive view can be readily taken of the whole subject, tend to place the law of property upon a better footing than it stands at present. The authorities are not likely to harmonize unless they are collected, and the entire subject examined. It is then that the discrepancies and departures from principle are for the first time observed."

A power, in law, may be defined to be an authority enabling a person to direct the devolution of property; and it may either be given or reserved, and the person possessing it is called the donee. Sir Edward commences his work as heretofore, by dividing powers into three classes. 1. Common law authorities. 2. Declarations or directions operating only on the conscience of the persons in whom the legal interest is vested. 3. Declarations or directions deriving their effect from the Statute of Uses. After his chapter on "*Scintilla Juris*," which we think should have been transferred to the Appendix, we have the further division of power, as "*appendant*," "*in gross*," "*both appendant and in gross*," and "*simply collateral*;" this latter classification of powers, the writer justly observes, is important only with reference to the ability of the donee to suspend, extinguish, or merge the power, and we confess we have long thought this end might have been attained in a much simpler way. The cases which Sir Edward cites, show, indeed, that in some instances violence must be done to the definitions, in order to bring certain powers within the scope of the desired rule.

Thus, where a settlement was made upon the settlor for life, with remainder to his wife in fee, with a power reserved for the settlor or any of the heirs of his body to revoke it, Bridgman, C. J. held, that this power to revoke, even with respect to the heir, was not simply collateral, but that it savoured or tasted of the land. Again, suppose a power to grant leases conferring the legal estate is given to one who has only an equitable estate for life, it is apprehended that this is not a power simply collateral. We would propose instead, that for this purpose, powers should be divided into two classes :

I. Powers coupled with an Interest.

II. Powers not coupled with an Interest.

I. Powers coupled with an Interest, are such as may be deemed a benefit to the donee ; e. g.

1. Powers by which the property of the donee may be directly increased, as powers to appropriate or dispose of property to his own use.
2. Powers by which the property of the donee may be indirectly increased or benefited, as powers of leasing, powers for a tenant for life to sell or consent to the sale of the settled property.
3. Powers by which the donee may increase the property, or confer a benefit on his wife, his children, or any other person. Such powers, it may be observed, though they do not enable the donee himself to derive any benefit from the property over which they ride, either directly or indirectly, yet they are in fact beneficial privileges, for they enable the donee to reward (and consequently they tend to produce) conduct by which he may have been greatly benefited, as the affection of a wife, or the dutiful conduct of a child. So such powers are beneficial to the donee, as they enable him to distribute not merely his own property, but also the property comprised in the power, amongst his children or other relations, as he under the circumstances may think proper.

II. Powers not coupled with an Interest, are those from the exercise of which the donee can derive no benefit ; as a power to trustees to sell or exchange settled property ; or a power to a trustee in a will to sell property and divide the proceeds. It used to be contended, that a power to appoint amongst children belonged to the second class, but such a power has, by several decisions, been assigned to the first class, and rightly, if the above-mentioned distinction divides the classes. Suppose a father has a power over 4000*l.* in favour of his three children, without any power of exclusion, and in default of appointment the children to take equally. This has been called a mere power of selection ; but still it is a beneficial privilege. The father may give 2000*l.* to one child, and thus he may indirectly benefit himself : for by giving the child a capital or an advancement of 2000*l.* or 3000*l.* he may procure for him a lucrative appointment or office, and thus free himself from the obligation of giving this child any further fortune. Cases may arise where a father may promote an advantageous marriage through the medium of such a power, by the influence of which the whole family may be benefited.

Since it has been decided that a power vested in a father to appoint to children is a beneficial one, or rather is not " simply collateral," the question whether such a power is extinguished by the bankruptcy of the father has been agitated in *Badham v. Meé*, and Sir Edward holds, " that the Bankrupt Law ought not to be held to destroy the powers in a family settlement, where their existence, and the exercise of them, do not affect the rights of the creditors." But does this dispose of the question ? Might it not be urged with reference to the intention of the donor of the power, which surely should be considered, that bankruptcy works so great a change in the condition of a man, and introduces him to so many temptations, that it is wise and politic to say, as a measure of precaution, that a bankrupt may not exercise any power over property by which he may indirectly and unjustly derive a benefit ? If a tenant for life, with a power to lease, conveys away his life estate to secure an annuity and reserves his power, it has been decided by the House of Lords in *Long v. Raukin*, that the power may still be exercised ; and Sir

Edward says, "upon principle it appears difficult to support the decision;" and he enforces his opinion by arguments which to us appear so important, and of such general application, that we shall quote them somewhat at length.

"The security of the remainder-man, it is said, depends upon the conditions and qualifications under which the power is to be executed. No doubt it does; but much also depends upon the choice of the tenant, and the *bona fides* of the transaction. A lease may be perfectly legal under the power, and yet not such a contract as would have been entered into by a provident tenant for life, binding his own estate as well as that of the remainder-man. It may, therefore, be of deep importance to a remainder-man, that the tenant for life, after he has involved himself with annuity transactions, and transferred his life estate to secure them, should not be at liberty to exercise the power of leasing under the directions of the annuitants when it has become a matter of little interest to himself upon what terms a lease is granted. If the donor were asked, 'Do you mean the tenant for life to exercise his power after he has parted with his life estate?' He would no doubt answer, 'No.' It is much easier for a tenant for life to grant an invalid lease than it is for the remainder-man to set it aside. The decision of the Lords would, of course, apply as well to a sale out and out as to a conveyance by way of mortgage or to secure annuities; and yet this consequence was not adverted to, although, in delivering the opinion of the Judges, the Chief Justice Abbott observed, that it was not necessary to say in that case, that a leasing power may not, by the terms in which it is given, be so inseparably annexed to the estate of the tenant for life as to become void and inoperative if he parts with his estate and transfers it to another. This, he added, *probably* may be so by the terms in which the power is given, because he who gives it may give it with what qualification he pleases. It is to be regretted that this point was treated as in any manner doubtful, for it admits of no doubt. The donor may, if he please, give the power to the tenant for life, exercisable only whilst the estate for life is actually vested in him; and the real question in *Long v. Raukin* was, whether that was not implied from the nature of the power in that case: a sale of the life estate out and out would have destroyed the power."—p. 70.

There appears to us great weight in these observations. A tenant for life, with a power to lease in the usual form, should

be quite independent of any foreign influence ; but after the decision in *Long v. Raukin* we are compelled to say, that if a life estate be conveyed by way of mortgage, and the power of leasing be reserved, it may still be exercised. Is there any difference in principle, supposing the life estate were sold out and out and the vendor covenanted to exercise the power at the request of the purchaser? Yet it is apprehended a Court would not readily allow that the power could be exercised in this latter case. It has also been decided, that though a tenant for life may mortgage his estate, yet he may consent to or exercise a power of sale or exchange over the settled property ; and it has even been attempted to preserve such a power on a sale of a life estate, by demising the estate to the purchaser for a long term of years dependent on the lessor's life, with a covenant by him to exercise his powers as the purchaser shall direct. But our author observes, "it may be doubted whether that plan is effectual, for during the term the tenant for life has lost that dominion over the estate which it may be thought he ought to retain in order to qualify him to execute his power." The difference between a sale out and out and a mortgage is very great ; and yet if we attend to the formal definitions of powers, we are compelled to say that in a Court of Law it is nothing. This is a strong reason why we should have recourse to some other rules which will enable our Courts to decide cases in reality very different, in different ways, without infringing what is called principle. After a mortgage an estate may be sold or exchanged by the mortgagor, the tenant for life, with the consent, of course, of the mortgagee. This is going far enough ; and yet if we bind ourselves to consider the question merely with reference to the power being "appendant," a Court of Law would be compelled to say, that after a sale out and out, if the power were reserved, the settled property might be sold or exchanged. Thus the purchaser of the life estate, an entire stranger to the family, an alien in blood and feeling, fonder of grouse shooting and salmon fishing than of knocking down pheasants and partridges in preserves, might, through the improvidence of a tenant for life, carry an ancient Dorsetshire or Cornwall family to the Highlands of Scotland. It is, however, apprehended to be quite clear, that if a tenant for

life becomes bankrupt or aliens his whole estate to a purchaser, he cannot afterwards exercise his powers of leasing or sale and exchange; and we submit the result should be the same though he only sells for "a long term."

The cases respecting powers are so various, and present such different aspects, that it would be extremely difficult to lay down any precise rules to guide us as to their suspension, extinguishment, or merger. But there are three points which deserve particular attention, the due consideration of which we think would, in most cases, lead us to a correct conclusion. 1. A power shall not be exercised if any estate or interest derived from the donee, would be thereby destroyed or prejudiced. 2. A power relating to the management or alteration of property shall not be exercised if the donee, having had a beneficial estate therein, wholly parts therewith; nor shall such a power be exercised unless the donee makes as good a bargain for his successor as for himself. 3. It vitiates the exercise of a particular power if the donee bargains for and obtains any advantage which may influence him against or in favour of any object of the power.

With respect to the first point we must remind the reader of the distinction which, though somewhat subtle, appears to be well settled, namely, that though a person having both an estate and a power cannot defeat or prejudice any disposition or charge made by him of or upon his estate by a subsequent exercise of the power, yet a case may be put in which a person having two powers over the same property, having exercised one for his own benefit, may still exercise the other so as to give the party taking under it the priority.

"Thus, in a case where lands were settled to A. for life, then to trustees for a term, upon such trusts as A. should direct, and then to uses in strict settlement, with a power of leasing to A.; A. first declared the trusts of the term for payment of his debts, and then granted a lease in exercise of his power. It was objected, that the estate was bound by the declaration of trust by A., and that he could not afterwards execute his power so as to overreach the term; but this was overruled, for the term was originally subject to the power, being contained in the same deed, and he having exercised his power the leases are precedent to the term and control it."

¹ Sugd. vol. ii. pp. 40, 48; and see *Doe v. Thomas*, cited p. 49.

We have detained our readers longer on this subject than we intended ; but it is of great importance, and we regret that Sir Edward Sugden has not, in addition to arranging, reconciling, and commenting on the cases, sought to place the whole doctrine on more intelligible and common sense grounds.

The profession are indebted to our author for an elaborate investigation of the case of *Reade v. Reade*, 5 Ves. 744, and for a clear statement of what was really decided by it. This case has been questioned by Mr. Jarman as inconsistent with the prior and approved decision in *Boyle v. the Bishop of Peterborough*, and we incline to think that the distinction which Sir Edward shows there is between the two cases should not be the ground of judicial decision. The rule established by *Boyle v. Bishop of Peterborough*, is stated by Sir T. Plumer to be, "that the death of one of the class over whom the power extends, even where there is no power of exclusion, does not prevent an appointment amongst the survivors of the whole sum to the full extent of the power." This is not the precise point decided in the above-mentioned case, for there the whole sum was not appointed to the survivor, though it is so stated by mistake by Sir Edward ; but the principle urged by Lord Chancellor Thurlow justifies Sir T. Plumer's rule. Now in *Reade v. Reade* a testator gave A. a power to appoint an estate amongst his (A.'s) four children, naming them, with a limitation by implication in default of appointment to the four children as tenants in common in fee. One of the children died in the testator's lifetime, and three-fourths of the estate were appointed to the three surviving children, and Lord Loughborough, C. seems to have held that as to the remaining fourth of the estate, the power was gone, for he decreed one-fourth to the heir at law of the testator. Sir Edward thus justifies this decision : "where the power as to an object never arose, and the share of the estate itself, which that object, if living, would have taken in default of appointment, lapses, it is reasonable that the power over that share should also lapse, if I may be allowed the expression.¹" We confess we do not coincide in this. The power is one thing and the limitation over another, and we would not con-

¹ Vol. i. 535.

found them. What says the testator? "I give A. power to appoint my estate, Whiteacre, amongst his four children, in any shares he may think proper." Here it is clear it was the testator's intention that A. might give, say, three-fourths to one child and the remainder amongst the other children. There is, too, a strong inference arising from the power, that with respect to this estate A.'s children, and not his, the testator's, heir at law, were the objects of his bounty. Why then abridge A.'s power on account of the death of one of the objects? Does the testator seem to say, "I consider the estate too much for three?" Quite the contrary; he says, A. may give it all but a fraction to one or two. The question is, over what did the testator intend A.'s power to ride? over the whole estate clearly. The only other point to be ascertained is, that there be an object in existence competent to take under the power. It seems to us but little to say that all the objects are not in existence, that A. has not the same extent of selection as the testator contemplated. If this were a valid objection it would go to destroy the power altogether. For A.'s power is not merely to give a certain and defined portion to each, for then on the death of one we should know how much to take out of the power. But if he may determine the shares of each, how can we say how much is to be abstracted on the death of one? To argue that, because the share of the deceased child under the limitation over lapses, therefore the power over that share lapses, is to us most illogical, for the cases are totally different. The shares under the limitation over are fixed in the respective children; if, therefore, a child dies, his share is vacant; but the shares under the power are not fixed; the power gives and vests nothing till it is exercised; this is a broad and substantial difference. We think *Reade v. Reade*, as explained by Sir Edward, is inconsistent with the principle of *Boyle v. Bishop of Peterborough*, and should not be followed.

The Section "Of the Qualifications which may be annexed to the execution of Powers by the Donees thereof," is perhaps the most unsatisfactory in the whole work: and it is desirable that we should state our objections; for truth cannot be

damaged by discussion, and error should not be allowed to acquire any authority by silence.

One question is, whether a donee of a power may not, in the absence of any express provision to the contrary, declare that his act shall not be irreversible, that is, whether he may not reserve a power to revoke his deed. First, it is clear that a donee of a power may, generally speaking, deliver a deed exercising a power as an escrow; and it seems now also equally clear that he may reserve a power to revoke his act. These two positions are both so stated and allowed by Sir Edward. The next question is, supposing a donee of a power exercise it, reserving simply a power to revoke, which power he also afterwards exercises, what is the effect produced upon the original settlement? Common sense or principle would answer, none whatever. The donee has, in fact, done nothing. He said so and so, but that was not to bind him irrevocably, and he has changed his mind. If any effect is produced upon the original settlement, by which act is it? It must be by the first, the appointment. But to attribute any effect to an appointment which has been revoked, is to deny the rule that an appointment may be qualified, may contain a power of revocation. But Sir Edward, though he starts from the same point as ourselves, arrives at a different conclusion, as we shall see in the following passage:—"Where the estate is at once settled to uses in strict settlement, with a power of revocation, and that power is afterwards executed by a new limitation, and a power of revocation only reserved, and the latter power is then exercised, in that case the last revocation would restore the original settlement, *but not*, it should seem, *the original power of revocation*. For, if the new power of revocation was not tantamount to a power to revoke and limit new uses, of course a revocation can only operate as such, that is, to revoke the appointment, *and then the original power is at an end*." [Though the sentence is introduced by "for," it is a mere assertion.] "For the first appointment was a full exercise of the power, but with the benefit of the power to revoke; and when *that* power is exercised, the original power is wholly exhausted, and consequently the original settlement remains incapable of being revoked." We have arrived at the end of Sir Edward's argument, and still we have little but

assertion. It, in fact, amounts to saying, that a revoking act cannot be conditional or qualified: but that we deny. We hold that the donee of a power of revocation may say, "My present will is that the uses of the original settlement shall be changed, but I may alter my mind." Sir Edward says, "the first appointment was a full exercise of the power, but with the benefit of the power to revoke." This is correct; but we think "the benefit" is almost nullified, when it is said that the exercise of it, though it enables him to undo what he has done, at the same time destroys his original power. It must be admitted that the case of *Ward v. Lenthal* is in favour of Sir Edward; but it cannot be denied that many of the sayings and doings in ancient times respecting powers, are not now to be admired or followed.

Mr. Preston says "a power to revoke will not authorize a new appointment." This Sir Edward shows to be a mistake, but not, we think, in the clearest way, nor with sufficient qualification. The owner of land conveys the same without consideration to A. in fee. The law gives the owner a power to declare uses upon the seisin created. This implied power he exercises, but with a qualification that he may revoke the uses. He does revoke them; and does not this act place him in his former seat with a power to declare further uses either absolute or conditional? Here we have the reason of the rule, that he that can revoke, may limit new uses. But the same statement which shows the reason, supplies a qualification,—that a power to limit new uses is only attendant upon a power of revocation, when that power is exercised by the owner of the resulting use. Such, we apprehend, is the meaning of Lord Nottingham's dictum, "that a mere power of revocation to a *stranger*, would not by implication give to him a power of appointment;" but Sir Edward says, that no person taking under the settlement could be treated as a stranger; which seems to us an incorrect definition of "stranger," having regard to the subject matter. A stranger to what? is the question. We answer, a stranger to the original use.

The last example shows how a power to revoke might be

¹ C. J. Bridgman observes in *Grange v. Tiring*, p. 120, *Bridg. Judgments*, that upon a revocation of uses "the law will raise up the old use."

lost, and yet no new uses limited. Suppose the owner were to exercise his power of revocation absolutely and simply by one deed, and then by another, to appoint new uses with a power to revoke them, which power he afterwards exercises. Here it might be said that the first act of revocation was unconditional, and that the power to revoke in the original settlement was *functus officio*; but, then, not merely that power, but all the limitations in the original settlement would be gone for ever, and we should have to go back to the resulting use.

But Sir Edward admits all difficulty is obviated, if the donee, when he exercises his power, reserves not merely a power to revoke, but also a power to limit new uses! This, with reverence be it said, is passing strange, when we recur to first principles. The mere donee of a power can give to himself a new power! An uncle settles land upon the marriage of a niece upon herself and husband, and their issue in strict settlement, but gives to the niece and her husband power to appoint the land amongst their children. This power they exercise, but afterwards annul their execution. If their first power be destroyed, can they give to themselves a new power over an estate of which they are but tenants for life? This, of course, Sir Edward would deny; but can he say it is not a legitimate inference from the doctrine he has admitted?

This notion, that a mere donee of a power can give to himself a new power, which may be found in some of the old cases, where, by the way, the donee was probably also the owner of the old use, has led Sir Edward into another error. He contends against Mr. Preston, that in limited powers, though the objects cannot be altered, the *formal mode* of execution may be varied by force of a new power reserved!¹ Thus, a father settles an estate upon the marriage of his son, upon the son for life, with remainder to his issue in strict settlement, and gives to the son a power to charge the estate by deed, executed in the presence of and attested by three witnesses, with £5000 for his own benefit. The son duly exercises the power, reserving a power to revoke and make a fresh appointment by deed, executed in the presence of and attested by two witnesses. He afterwards revokes and makes a fresh ap-

¹ Vol. i., p. 465.

pointment accordingly, with only two witnesses. Sir Edward contends that this second appointment is valid. But how stands this with the intention of the settlor? He says the land shall not be charged except by deed with three witnesses. but it is charged by deed with only two witnesses. Sir Edward cites two cases, *Adams v. Adams*, Cowp. 651, and *Brudenell v. Elwes*, 1 East, 442, and 7 Ves. 382, but in neither case was the point raised, and we rather think it was involved in neither. In the former, the second deed of appointment was executed according to the terms of the original power, but the first deed of appointment, which reserved a power to revoke with a power to make a fresh appointment, did not refer to those terms; and Sir Edward says, "this case, therefore, decided that a new power to revoke and appoint may be reserved without any formalities, and if it may be reserved, it may no doubt be executed." The answer we venture to give to this, is, the power of appointment reserved was mere surplusage, and the verbiage of the conveyancer, and was in fact a nullity. The power which remained to be executed was the original power, and that was complied with. With respect to *Brudenell v. Elwes* the same answer may be given, if the report in *Vesey*, which differs from that in *East*, may be relied upon; but however this may be, the point was not alluded to. There is no doubt a donee of a power may reserve a power to revoke an appointment made by him with any terms he thinks proper;¹ but this only has reference to his own act, and not to the estate of the settlor, and does not justify the rule which Sir Edward insists is established. We agree with Mr. Preston.

Here we may observe, that it appears to be settled by *Adams v. Adams*, Cowp. 651, that if an appointment be revoked, the limitations in the original settlement remain as if no appointment had been made. In that case an estate, ultimately, stood limited to Mrs. Adams for life, with remainder

¹ See accordingly the observations of Shadwell, V. C., in *Hougham v. Sandys*, 2 Sim. 139. But his Honour seems also to have thought that the donee of the power could invest herself with a new power; but she and her advisers pursued a safer plan; for they (and this was overlooked by the learned Judge) expressly declared that they made the second limitation of uses, by virtue of the power contained in the original deed.

to such of her children as she should appoint, with remainder to her first and other sons successively in tail, with remainders over. Mrs. Adams, by a deed dated 4th July, 1767, appointed the estate to her daughters for 500 years, redeemable by her son upon payment of £3000 to each of the daughters, remainder to her son in fee; with a power to revoke and limit new uses. Mrs. Adams, by a deed dated 25th October, 1771, revoked her former appointment, constructively, and limited life estates to her daughters, with remainders over, which were void, as not being warranted by the power. It was held that subject to the life estates to the daughters, the son took an estate tail, under the original settlement.¹

Our author examines in detail the principal cases which have arisen under that perplexing head—whether a power is exercised, though there be no express reference either to the power or the property?² The question is generally upon wills. Sir Edward seems disposed to doubt the propriety of the decision of Sir W. Grant, in *Jones v. Tucker*, 2 Mer. 533, who held that a power to appoint the sum of £100, was not well exercised by a gift, as a general legacy, of that sum; but we confess we do not quarrel with this case. The question, it is allowed, is one of intention; and unless it can be said that the mere fact of the sum named in the power and the general legacy being the same in amount, is a sufficient indication of such intention, the decision, we submit, is right. The criterion that the will is in operation without the power, cannot be properly applied, except in the case of real or leasehold property, or specific chattels. It was said, indeed, in *Jones v. Tucker*, that the testatrix had no funds of her own to satisfy the legacy, without the power-sum; but the very learned Judge, rightly we think, declined to assent to the desired inference. For how did the testatrix's poverty at her death show her intention when she made her will? Yet was not that the real question? It surely could not be wise in a Court to authorise such an inquiry. The general rule is, a will of personalty speaks at the death. Sir Edward thinks the case of *Forbes v. Ball*, decided by the same Judge, inconsistent with *Jones v. Tucker*; but it should be observed that

¹ See Sugd. on Powers, Vol. ii., 62, et seq.

² Vol. i., 387, et seq.

in that case the legacy, though general, was given to the objects designated in the power, so that it may be said there was a reference to the power.

Sir Edward Sugden shows that a power may pass to, and be exercised by, the representatives of a person, as his heirs, executors, administrators, or assigns: and it is under this doctrine that powers in mortgage deeds are framed. But the nature of these powers is often imperfectly understood; they are certainly neither common law authorities, nor declarations or directions deriving their effect from the statute of uses: neither are they declarations or directions operating on the conscience of the person in whom the legal interest is vested. They are, in fact, a power to release or destroy that peculiar, though now well known and understood, equitable corporeal hereditament called an equity of redemption. They cannot offend against the rule of law against perpetuities, for their subject-matter, though it may continue for centuries, is not subject to that rule. So long as the equity of redemption continues to exist, the power continues; and if the equity be released or otherwise destroyed, of course the power ceases, for it ceases to have any thing to act upon. If it be said that an equity of redemption is even such an estate that the law will not endure should be overshadowed by a power for an unlimited period—and we allow that this equitable estate, as well as other equitable estates, when treated and considered independent of the legal estate, cannot be tied up further than a legal estate can,—we answer, that even in this point of view, the power alluded to is free from objection. For suppose A., seised in fee simple, were to convey his land to such uses as B., his executors, administrators, or assigns should appoint, and in default of appointment, to A., his heirs and assigns, with a declaration that the power given to B., his executors, administrators, and assigns, should cease, on payment to him or them at any time of a certain sum, with interest, by A., his heirs or assigns, and that until payment the power should exist in full force, and might be exercised without the concurrence of A., his heirs or assigns,—could this disposition be impeached as against any rule of law? It appears to us not to offend more against the rule against perpetuities than a common mortgage without a power of sale; for during the existence of the mort-

gage, neither the mortgagee, his heirs, executors, administrators, or assigns, nor the mortgagor, his heirs or assigns, can be deemed to have a sole and absolute interest in the property. In the case supposed, B., his executors, administrators, or assigns, might alone sell, but would, in equity, be deemed liable to account to A., his heirs or assigns, for the purchase money. So A., his heirs or assigns, might alone sell, but could not make a good conveyance without payment of the mortgage money and interest. A., his heirs or assigns, might at any time free their estate from the power, by payment of the mortgage debt. It would not be the power, but the non-payment of the money, that would keep the legal estate in fee in suspense, and vested only *sub modo*. Such a power would be analogous to a power of sale, attendant on an estate tail. But though this may be the usual power of sale in a mortgage deed, it is wholly independent of the legal estate ; it affects only the equity of redemption, and the object of it is to give to the mortgagee and his real or personal representatives, and his or their assigns, an absolute right to convey this equity, leaving the same right in the mortgagor, his heirs and assigns ; such a power does not prevent the vesting of any estate, either legal or equitable, nor can it prevent the alienation of any estate. It seems to us immaterial, with reference to the present question, whether a power of sale in a mortgage deed be given to the mortgagee, his heirs or assigns, or to him, his executors, administrators, or assigns. The most correct form of giving it seems to be, that the mortgagor should covenant or declare that it shall be legal for the mortgagee, &c.

We now proceed to consider what Sir Edward says in his 17th Chapter, s. 2, under the head of "What may be demised under different Powers ;" and this will embrace the question, whether mines can be demised under the common power of leasing contained in settlements. We are told in the cases under this head, and Sir Edward merely repeats their language, that the intention of the parties must decide in each particular case what shall be deemed to be comprised in the power of leasing. But this is not very satisfactory ; for the same may be asserted as the rule for the decision of every question which may arise upon a settlement, except that in

deeds certain technical words cannot be dispensed with in the limitation of estates. In *Bagot v. Oughton*¹ there was a power to lease "all or any part of the premises," at such yearly rents or more as the same were then let at; and it was held that a lease of the family mansion-house and grounds, which had not been before let, was void. It was well argued by counsel, "that general words in a deed are to be restrained by particular and subsequent words in the same clause," and consequently, that though the mansion-house and grounds were comprised in the power, yet that the condition that the usual rent should be reserved, excluded them. This rule, which is of undoubted authority,² is an excellent criterion for ascertaining the "intention" of the parties; and we prefer this, as the ground for the decision is the last mentioned case to what Lord Mansfield proposed, namely, that "the nature of the thing" declared the intent as forcibly as the most direct words could have done.³ For in *Foot v. Marriott*,⁴ where there was the same decision, "the nature of the thing" showed nothing, and yet the Court arrived at the same conclusion. In that case, there was a power to lease "all or any of the tenements devised" under the rents then reserved, and it was held that a tenement not in lease could not be let under the power. The rule which we have recommended also justifies the contrary decision in *Goodtitle v. Funucan*.⁵ There the power was to demise "all or any of the manors, fisheries, messuages, lands, tenements, and hereditaments thereinbefore mentioned, so as there was reserved so much rent or more than was then paid for the same." A certain manor and fishery of very trifling value, had never been demised before, and they were included in a lease with lands, at a rent which exceeded the former rent of the lands and the annual value of the manor and fishery, and the lease was supported. Here we see, that the manor and fishery, being expressly mentioned in the power, were the particular, and the condition as to the

¹ 8 Mod., 249.

² *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa.*—8 Rep., 118 b.

³ Doug., 573, 574.

⁴ 3 Vin. Abr. 429, pl. 9. See, too, *Pomeroy v. Partington*, 3 Term Rep., 665.

⁵ Doug., 565.

rent to be reserved was the general, so that our rule required the decision which was made. But in order to provide for such cases as *Goodtitle v. Funucan*, C. J. Holt, in a former case, propounded the following rule:—"If a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification." But this as a general rule is not true, for it is inconsistent with several cases. But Sir Edward says, there are cases to which it ought to be applied, as, "if in a power to lease estates, including mines opened and unopened, a *clear intention* appears to embrace *all* the mines; but a clause is added, that no lessee shall be made *dispunishable of waste*; there to effectuate the general intention of the power, the latter clause should not be deemed applicable to the unopened mines."¹ Admitting the premises of our author, we have no difficulty in coming to the same conclusion, but his own statement shows that Lord Holt's rule is of no use in the matter; for if there be the "clear intention" required, it is easy to say that the general clause as to waste which follows many particulars, shall not shut out any expressly included.

If mines, as well opened as unopened, be included in a power to lease, it is clear that they may be demised notwithstanding any general qualification against waste. But the difficulty is, supposing that in a settlement of estates comprising mines of both kinds, the power of leasing is expressed in general terms, "all or any of the premises," and there be a clause against waste, can any mine be demised? We know that *Campbell v. Leach*² has decided that in such a case open mines may, but then it should be observed, that the mine in question was in lease at the time of the settlement, and that it was stated, that the mine would be ruined if discontinued, and that it was a material and most valuable part of the estate, so that taking away the open mine, then being worked, out of the leasing power, would have been to have taken away the kernel, leaving only the shell. Mines were not mentioned in the leasing power, but as they were then a

¹ Vol. ii., 351.

² Amb. 740.

substantive possession, and were not excepted together with the mansion-house, which was excepted, the implication was strong, that they were intended to be included. We should therefore, perhaps, not consider *Campbell v. Leach* as an authority that open mines may in all cases be demised under the common leasing power. Certainly the clause against waste is not an obstacle, but consider "the nature of the thing." The power is to let for twenty-one years at the best rent. Does not this imply that at the end of the term the thing demised will remain, otherwise the power is to sell and not to lease: and we know that within the term a whole seam of coal may be even wrought and burnt. Without a clear expression of intention we should not say that the tenant for life may pocket the inheritance. True it is, that any tenant for life may work open mines for his own advantage, but this the law gives him, and we should not hence imply that he can make a lease to bind his successor. Again, the reservations in a lease of mines are not properly rents; they do not issue out of the thing demised, as fruit annually renewed; they are in fact parts of the corpus; "something analogous to rent" is the utmost we can say of such reservations. What would be thought of a lease of woods and plantations, with power to cut down and carry away the same for twenty-one years, reserving the best rent? And yet such a lease seems quite as reasonable and as consistent with the usual power as a lease of mines, even if the same be open. The special circumstances of *Leach v. Campbell*—in which case, too, it may be remarked, there had been a great outlay on the part of the tenant—were sufficient to justify the decision, but we cannot say that it establishes a general rule. And we think it clear, that unopened mines cannot be demised under the common power of leasing, unless they be expressly mentioned; but, of course, if the tenant for life be without impeachment of waste, he may grant a lease during his own life, and the lessee would be entitled to remove the colliery fixtures as against the remainder-man.

Sir Edward Sugden adverts to the recent cases which have been decided, as to the validity of the usual powers of sale

and exchange in settlements of real estate, which we discussed in our 14th volume, p. 369, et seq. Our author says, "the general point is set at rest, but it may still be a question during what period the power is capable of being exercised;" he then quotes the observations of Mr. Preston (who seems to state correctly, that during the estates for life and in tail, the power may be exercised,) and proceeds,—“the point is not without difficulty. The power, although unlimited as to time, is good for the lives of parties living at the date of its creation; and it may be *now* that the power might be held further to exist for twenty-one years from the death of the survivor of the lives. Where the power is to be exercised by or with the consent of a tenant for life, that is of itself a lawful limit, and so far is good. If the power proceed to authorise the trustees, after the death of the tenant for life and during the minority of tenants in tail, to sell or exchange, that might be deemed good *pro tanto*, that is, during the twenty-one years from the death of the tenant for life. If the Court should go further, the power might travel through generations. If it might be exercised legally *against* a tenant in tail, though really for his benefit, it would be on the ground that the tenant in tail might bar the power if he pleased; and although he could not do so during his minority, when, if at all, the power would be exercised against him, yet an executory limitation or shifting use after an estate tail is open to the same objection, for the event may happen during the minority of the tenant in tail, and before it is in his power to bar the entail, and yet long after the legal limit to such limitations, if they are not preceded by an estate tail. It would be difficult to distinguish the cases. It is not improbable that the power may be sustained throughout its whole range. There appears to be principle and authority sufficient to support such a decision.” In these concluding words we entirely concur; and we regret Sir Edward should have proceeded so long in a doubting strain before he arrived at them, and yet without advancing a single argument against the validity of the power except the expression which fell from Lord Eldon in *Ware v. Polhill*, a totally different case, “that the power might travel through generations.” Of course it might, but so may an estate tail, and yet it is not

said that that estate is void as tending to a perpetuity. We regret Sir Edward has not gone a little deeper into the subject, for he seems only to have skimmed the surface *currente calamo*. We think it will be found that there is no objection to a power on the score of perpetuity, unless it may, *proprio, vigore*, prevent the absolute alienation of an estate for a longer period than a life or lives in being and twenty-one years after. Any obstacles to alienation which may arise from infancy, lunacy, or other incapacity, cannot be charged against the power. A perpetuity is thus defined by Sanders, 1 Uses & Trusts, 196, "A future limitation, restraining the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined, or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity."

We have thus commented freely on several portions of the celebrated work before us which seem erroneous or defective, and it is now time that we should give an opinion as to its general character. Its great and distinguishing praise undoubtedly is, and it is no mean praise, that it is what it professes to be, a "Practical Treatise." It collects and analyzes and states, with admirable precision and accuracy, the results of every important case found in our books respecting powers,—how valuable this is to every practitioner we need not say—so that though it ought not to be thought to supersede the reports themselves, it may be safely used as a master-key to open out their treasures. The leading defect seems to be an insufficient development of the principles involved in the several doctrines discussed: but admitting the work to be deficient as a scientific production, it will be accepted by every candid and intelligent member of the profession as a large instalment towards payment of the debt which its very learned and distinguished author has been pleased to acknowledge.

DIGEST OF CASES.

COMMON LAW.

[Comprising 3 Adolphus & Ellis, Part 4; 4 Adolphus & Ellis, Part 1; 6 Nevile & Manning, Part 2; 1 Nevile & Perry (in continuation of Nevile & Manning), Part 1; 3 Bingham's New Cases, Parts 1 & 2; 3 Scott, Part 1; 1 Meeson & Welsby, Part 5, and 2 Meeson & Welsby, Part 1; 1 Tyrwhitt and Granger, Part 5; and 5 Dowling's Practice Cases, Part 1:—all Cases included in former Digests being omitted.—5 Manning & Ryland, Part 3, and 5 Tyrwhitt, Part 3, also published within this quarter, contain no Case which has not been before digested.]

ACCOUNT STATED.

A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a pass-book. A. became a lunatic, but the account continued to be kept with his family, and in the pass-book, the entries in which were in B.'s hand-writing, a balance was stated to the credit of A.: Held, that this was not evidence to support a count on an account stated with A., in an action brought by his representative against B., to recover the amount of such balance.—*Turbuck v. Bispham*, 2 M. & W. 2.

ACTION ON THE CASE.

(*Liability of next neighbour.*) Declaration stated, that the plaintiffs were possessed of a vault adjoining certain walls, and which was of right supported in part by parts of the adjoining wall; that the plaintiffs were of right entitled that their vaults should be so supported; and that there were foundations belonging to the vault which the plaintiffs ought to enjoy: yet the defendant wrongfully removed the wall adjoining the plaintiffs' vault, without taking proper precautions to support it, and wrongfully disturbed the foundations, without taking precautions to prevent them from giving way; *per quod* the plaintiffs' vault was damaged by the fall of some materials, which otherwise would not have hurt it, and special loss ensued. Plea, as to the not taking precautions to support the vault, that the defendant was not bound by law to take such precautions: Held bad, as tendering an issue of law for a jury, and as containing the traverse of a duty not alleged by the plaintiffs. For the same reasons, a plea that

the defendant was not bound by law to take precautions to prevent the foundations of the vault from being weakened; and a plea that the fall of the materials was not occasioned by any act or default of the defendant, or the neglect of any duty by law cast on him, were held bad: Held also, that the declaration disclosed a sufficient right of action. (9 B. & C. 725; 5 B. & Ald. 837; 2 C. & J. 20; 1 C., M. & R. 254; 3 B. & Ad. 871; 1 Ad. & Ell. 493.)—*Trower v. Chadwick*, 3 Bing. N. C. 334.

ADVOWSON. See QUARE IMPEDIT.

AFFIDAVIT.

1. (*Title of—Attachment.*) An attachment may be said to be *granted*, when the rule for the attachment is obtained, and after that the proceedings are on the *crown* side of the Court, and affidavits in the matter are properly intitled *Rex v. The Sheriff of ———*.—*Rex v. Sheriff of Middlesex*, in *Barton v. Morgan*, 2 M. & W. 107.
2. It is no objection to an affidavit used in opposing a motion, that it has been sworn after the day on which the rule was due, if it were sworn before cause actually shown. (1 Chit. Rep. 27, 136; 2 D. P. C. 391.)—*Graham v. Beaumont*, 5 D. P. C. 49.
3. "A. B., clerk to C. D., the defendant's attorney," is not a sufficient description of a deponent.—*Daniels v. May*, 5 D. P. C. 83.
4. An affidavit cannot be made use of if altered after it is sworn.—*Wright v. Skinner*, 5 D. P. C. 92.

AFFIDAVIT TO HOLD TO BAIL.

1. In an affidavit of debt for the agistment of cattle, it must be alleged that they were agisted "at the request of" the defendant.—*Smith v. Heap*, 5 D. P. C. 11.
2. (*Title of.*) An affidavit to hold to bail, not entitled in any Court, but sworn in Scotland before a commissioner of the Common Pleas and Exchequer, may be afterwards entitled and used in either Court.—*White v. Irvine*, 2 M. & W. 126.

ARBITRATION.

1. (*Revocation of submission.*) The 9 & 10 W. 3, c. 15, and the 3 & 4 W. 4, c. 42, s. 39, apply to references of civil proceedings only. When therefore criminal matters are referred, the submission is revocable at common law.—*Rex v. Bardell*, 1 N. & P. 74.
2. (*Award, when bad for uncertainty—Time for setting aside award.*) A verdict was taken by consent for 3000*l.* damages and 40*s.* costs, subject to a reference of the cause and all matters in difference between the parties. The arbitrator by his award directed that a verdict should be entered for the plaintiff, and that the defendant should pay the sum of 260*l.* to the plaintiff, but did not expressly state for what amount the verdict should be entered: Held bad for uncertainty.

A rule nisi to set aside an award need not be moved for within the first four days of the term next after the publication of the award. (But see *post*, pl. 8.)—*Martin v. Burge*, 6 N. & M. 201:

3. An award contained a direction that the defendants in a cause should sign an undertaking not to pirate an invention of the plaintiff's. The defendants accordingly sign such an undertaking: Held, sufficient evidence that the defendants had submitted to the arbitration.—*Stuart v. Nicholson*, 3 Bing. N. C. 113.
4. (*Award, when sufficiently final.*) A cause and all matters in difference between the parties being referred to arbitration, the arbitrators, "having heard the proofs and allegations of the parties touching the matters in difference between them," awarded, "concerning the same," that the defendant should pay the plaintiff 11*l.* 5*s.* in full of all demands in the cause: Held sufficiently final.—*Day v. Bowin*, 3 Bing. N. C. 219.
5. (*Arbitrator's authority—Withdrawal of juror, when a determination of the cause.*) A client sued his attorney for negligence and bad advice, and also for money had and received to his use. To the counts for negligence, the defendant pleaded the Statute of Limitations; to the money counts a set-off for bills of costs. At the trial, the Judge having expressed an opinion that the Statute of Limitations was a bar to the plaintiff's recovering on the counts for negligence, at his suggestion the pecuniary accounts between the parties were referred to a barrister, and a juror was withdrawn. By the order of reference, the arbitrator was to settle all matters in difference between the parties touching the defendant's bill of costs, and all the plaintiff's demand on the defendant, with power to have the defendant's bills taxed; and to ascertain the balance between the parties, and direct by and to whom, and when, the same should be paid; *but no question of liability was to be raised*. The arbitrator directed the defendant's bills to be sent for taxation, and in the mean time the plaintiff discovered that the defendant was not admitted in the Courts at Westminster (but only in the Court of Great Session in Wales), when a considerable part of the business was done, and he raised that objection before the arbitrator. The arbitrator, by his award, after stating that he had heard, examined, and considered the proofs, &c. of the parties, and had admitted and considered the evidence tendered to show the several times when the defendant was admitted in the superior Courts, awarded that the balance due from the defendant to the plaintiff was 170*l.* and a fraction, and directed the defendant to pay that sum to the plaintiff. On motion to set aside the award, on the ground that the arbitrator had exceeded his authority in making any deductions in respect of the defendant's non-admission in the superior Courts, there were conflicting affidavits as to whether the *liability* in this respect was in the contemplation of the parties at the time of the submission. The Court, however, set aside the award; and, on a subsequent motion, stayed the proceedings in the cause, on the ground that the withdrawal of a juror, under the circumstances, finally determined the action.—*Harries v. Thomas*, 2 M. & W. 32.
6. (*Construction of arbitrator's certificate—When out of time.*) To an action of assumpsit on a builder's bill, the particulars of demand being 104*l.* 12*s.*, the defendant pleaded payment of 30*l.* before action brought, and payment into Court of 45*l.* more. The cause was referred at Nisi

Prius to a surveyor, who was to measure and value the plaintiff's work, and to certify for whom and for what amount the verdict should be entered; no order of Nisi Prius being drawn up. He certified that he was of opinion that 74*l.* 7*s.* was a fair and proper sum *to be paid* to the plaintiff: Held, that this amounted to a verdict for the defendant.

The Court refused to set aside the certificate on the ground that it was made some months after the jury process was returnable, the plaintiff not having withdrawn from the reference on that ground.—*Salter v. Yates*, 2 M. & W. 67.

7. (*Enlargement of time—Appointment of third arbitrator.*) Where a cause was referred to two arbitrators, with power to them to appoint a third, the award to be made by a day named, or such other day as *they or any two of them* should appoint, and the two originally named enlarged the time for making the award before they appointed the third: Held, that this was an invalid enlargement, and that the award made by the three could not be enforced by attachment.—*Reade v. Dutton*, 2 M. & W. 69.
 8. (*Time for setting aside award.*) In C. P., where a cause is referred to Nisi Prius, and a verdict entered, a motion to impeach the award must be made within the first four days of the following term. (3 B. & P. 344.)—*Lyng v. Sutton*, 3 Scott, 187; 5 D. P. C. 39.
 9. (*Award, when final.*) Where a cause and all matters in difference are referred to an arbitrator, and by his award he merely directs a verdict to be entered for the plaintiff for one entire sum, the award is not final, and therefore bad.—*Gyde v. Boucher*, 5 D. P. C. 127.
- And see *COSTS*, 3.

ASSUMPSIT.

- (*Consideration.*) *Semble*, that a declaration in assumpsit stating that the plaintiff, being about to proceed to N., paid money to the defendants in London, that they might cause it to be paid to him at N. on a certain day; that the defendants received the money for that purpose from the plaintiff; and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at N., discloses a sufficient consideration for the promise. (Cro. Jac. 667.)—*Shillibeer v. Glyn*, 2 M. & W. 143.

ATTORNEY.

1. (*Summary jurisdiction over.*) The Court cannot interfere summarily to compel an attorney to pay over money received for a client, in an action in that Court, unless he be an attorney of *that* Court. But the application may be made to the Court of which he is an attorney.—*Sharp v. Hawker*, 3 Bingham, N. C. 66; 5 D. P. C. 187.
2. (*Breach of duty by disclosure of client's title.*) An attorney, employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender certain defects in the mortgagor's title, whereby he was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money, and was compelled to pay a higher rate of interest: Held, that this was a breach of duty for which the attorney was liable to an action, although

before his retainer by the mortgagor he had been the attorney of the proposed lender. (Com. Dig. Deceit, A. 5; 19 Ves. 261.)—*Taylor v. Blacklow*, 3 Bingh. N. C. 235.

3. The Court will not set aside proceedings carried on by an attorney for a party from whom he has no authority, unless it appear that the attorney is insolvent. (Salk. 86, 88.)—*Stanhope v. Firmin*, 3 Bingh. N. C. 301.
4. (*Lien of*.) A. devised certain estates to trustees, upon trust to pay a part of the rents and profits to his widow, and the residue towards the maintenance and education of his son, until he reached twenty-one; and after that time to him, during the lifetime of the widow; and upon her death he devised the estates to his son in fee. The trustees having occasion to employ the defendant, an attorney, to defend certain causes and suits in carrying into effect the trusts of the devise, incurred a debt to him for certain costs and expenses, for which they deposited the title deeds with him as a security: Held, that the defendant had no lien upon them against the son, after the decease of his mother, as the debt was the personal debt of the trustees.—*Lightfoot v. Keane*, 1 M. & W. 745.
5. (*Taxation of bill*.) The Court refused to send an attorney's bill for taxation, on the undertaking of one of two joint plaintiffs; the application being made on the ordinary affidavit.—*Hobby v. Pritchard*, 2 M. & W. 124.
6. (*Delivery of bill*.) Charges in an attorney's bill for attendances on his client to advise him on matters subsequent to the conclusion of an action, do not render it necessary that a bill should be delivered a month before action brought.—*Pepper v. Yeatman*, 5 D. P. C. 155.
7. (*Delivery up of papers by—Attachment against*.) The Court will not grant a rule, requiring an attorney to deliver up papers, and in the alternative for an attachment in case of non-delivery, but each branch must be made the subject of a separate motion.—*Roscoe v. Hardman*, 5 D. P. C. 157.
8. (*Attachment against*.) A rule for an attachment against an attorney for non-payment of money pursuant to his promise, cannot be obtained; a previous rule requiring the payment of the money must have been made absolute.—*Twiss v. Fry*, 5 D. P. C. 157.

And see COSTS, 3, 10; EVIDENCE, 5; PLEADING, 5.

AUCTION. See EVIDENCE, 1.

BAIL.

1. (*Setting aside bail-bond for irregularity*.) On a summons to set aside a bail-bond for irregularity, it is not competent to the party summoning to raise an objection as to the indorsement of the capias.—*Yates v. Chapman*, 3 Bingh. N. C. 262.
2. (*When discharged*.) Where the plaintiff, in the progress of a cause, agreed to give the defendant a month's time to pay the debt, the time expiring before judgment could by the practice of the Court be obtained, and final judgment not having been in fact signed before the arrangement was entered into: Held, that the bail were not discharged.—*Whitfield v. Hodges*, 1 M. & W. 679.

3. (*Waiver of*.) Notice of justification of bail having been given, the plaintiff delivered a declaration *de bene esse*, to which the defendant demurred. The plaintiff, after an ineffectual attempt to have the demurrer set aside as frivolous, obtained an order to join in demurrer: Held, that, after this, the bail could not be opposed, nor could they justify.—*Bolton v. Johnson*, 2 M. & W. 42.
4. (*Affidavit of justification*.) Bail (at least town bail) may justify in person, where there has been an insufficient affidavit of justification.—*Shave v. Spode*, 2 M. & W. 42.
5. (*Justification at chambers*.) A defendant, not in custody, cannot justify his bail at chambers in vacation, unless he is required to do so by the plaintiff, pursuant to 1 Reg. Gen. H., 2 W. 4, s. 17.—*Barratt v. James*, 5 D. P. C. 123.
6. (*Justifying one bail*.) A defendant cannot justify one bail, who alone appears, without the plaintiff's consent.—*White's bail*, 5 D. P. C. 133.

And see EJECTMENT, 5.

BANKRUPTCY.

1. (*Fraudulent preference—Payment to bankrupt, when protected*.) A. placed in the defendant's hands a quantity of silks, as a security for advances. On the 27th November, an order from A. was delivered to the defendant, to advance B. 500*l*. on the silks; but no advance was made on that day. On the 3d December, A. committed an act of bankruptcy; on the 5th a fiat issued against him. On the 6th, the defendant advanced money to B. on the order of the 27th November, which order the jury found to be a fraudulent preference: Held, that this was not a payment to the bankrupt, protected by the 6 G. 4, c. 16, s. 82.—*Green v. White*, 3 Bingham N. C. 59.
2. (*Act of bankruptcy*.) An assignment by a trader to a creditor of all his effects and stock in trade, is of itself an act of bankruptcy.—*Siebert v. Spooner*, 1 M. & W. 714.
3. (*Liability of official assignee*.) The official assignee in bankruptcy is not within the protection of the 6 G. 4, c. 16, s. 44, and is not therefore entitled to notice of action by the alleged bankrupt for seizing his goods under the fiat. (5 Bingham 270; 8 B. & C. 697; 2 B. & Ad. 177.)—*Knight v. Turquand*, 2 M. & W. 101.

BENEFICE. See QUARE IMPEDIT.

BILL OF EXCHANGE.

1. (*Pleading—Evidence*.) To a declaration on a bill of exchange by indorsee against acceptor, the defendant pleaded that the bill was drawn for the accommodation of him, the defendant, and had been indorsed to the plaintiff by the holder, in fraud of the defendant, and after it became due. To this plea the plaintiff replied by a special traverse of the fact of the indorsement having been made after the bill became due. Held, that the issue raised by these pleadings threw the burden of proof on the defendant:—*Lewis v. Packer*, 6 N. & M. 294.

2. (*Notice of dishonour—Title of indorse.*) Where a foreign bill of exchange is presented for acceptance and refused, and protested for non-acceptance, a letter to the drawer stating the presentment, refusal, and protest, but not containing a copy of the protest, is a sufficient notice to charge the drawer.

Where a bill which has been lost or fraudulently obtained, subsequently comes into the possession of a holder for value, he is entitled to recover upon it, unless he took it under such circumstances as to show *mala fides* on his part. Even gross negligence on his part is not sufficient to impeach his title.—*Goodman v. Harvey*, 6 N. & M. 372.

3. (*Giving bill to take up note—Pleading.*) To a declaration by the indorsee against the maker of a promissory note for 420*l.*, the defendant pleaded, that, after it became due, he gave the plaintiff, and the plaintiff received from him, two bills of exchange for 210*l.* each, to take up the note, and in lieu thereof: that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in the plaintiff's hands. The defendant gave in evidence a memorandum, signed by the plaintiff, stating that the defendant had given him two bills for 210*l.* each, to take up the note for 420*l.*; and it appeared that one of the bills was overdue and unpaid at the commencement of the action: Held, that it was a question for the jury whether the bills were given in lieu of and satisfaction for the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action.—*Goldshede v. Cottrell*, 2 M. & W. 29.
4. (*Notice of dishonour.*) A bill of exchange, indorsed in blank, was left by the indorsee at the office of R., an attorney, to be presented by him. On being presented by R., it was dishonoured. R. wrote to the drawer on the following day, describing the bill, and stating that it was dishonoured, and subscribed his name and residence to the letter: Held, a sufficient notice of dishonour, though he did not state on whose behalf he applied, or where the bill was lying.—*Woodthorpe v. Lawes*, 2 M. & W. 109.

And see PLEADING, 18.

BOND.

- (*Illegal condition.*) To debt on bond, the defendant pleaded that the bond was given in pursuance of a corrupt agreement that the defendant should serve the obligee as an apprentice to the business of surgeon, apothecary, and man-midwife, for two years; and that the agreement should be ante-dated to make it appear he had served five years, in order that by such corrupt contrivance he might be admitted to his examination for the business of an apothecary at the end of two years, instead of five, as required by statute. A verdict having been found for the defendant, the Court refused to enter judgment for the plaintiff *non obstante veredicto* on the ground that it appeared to be the object of the parties to enable the defendant to practise as a surgeon also, and that a five years' apprenticeship was not re-

quired for the business of a surgeon; and also that it was not open to the defendant to object to the legality of his own bond.—*Prole v. Wiggins*, 3 Bingh. N. C. 230.

BREACH OF PROMISE OF MARRIAGE.

(*Pleadings*.) To an action for breach of promise of marriage, the defendant pleaded, first, that after the promise he discovered the plaintiff to be an immodest, lewd, and unchaste person; and, being unmarried, to have had carnal intercourse with A. B.; secondly, that after his promise the defendant discovered that plaintiff, being unmarried, had committed fornication with some person or persons to the defendant unknown, and had been delivered of a bastard child: Held sufficient.—*Young v. Murphy*, 3 Bingh. N. C. 54.

BROKER.

A broker cannot maintain an action for work and labour, and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16.—*Cope v. Rowlands*, 2 M. & W. 149.

CARRIER.

1. (*Contract of keeper of booking-office*.) The contract entered into by the keeper of a booking-office, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier. Proof, therefore, that a parcel delivered to him failed to reach its ultimate destination, is not of itself sufficient to charge him.—*Gilbart v. Dale*, 1 N. & P. 22.

2. Where the plaintiff gave a parcel, directed to F. in London, to a carrier at B., who drove a mail-cart between B. and M., and the carrier booked it at M., at an inn where the defendant's coach stopped to take in parcels, and received the carriage for it from the innkeeper, who was in the habit of booking parcels for the defendant's coach; and the innkeeper did book this parcel to London, and delivered it to the coachman of the defendants: Held, that the carrier was the agent of the plaintiff, and the innkeeper the servant of the coach proprietors, and that therefore the plaintiff might recover damages from the latter for the loss of the parcel.

An inn where a book is kept for booking parcels by a particular coach, which stops there regularly to take in and deliver parcels, is a *receiving house* for parcels within the meaning of the Carriers' Act, 11 G. 4, and 1 W. 4, c. 68; although other coaches stop there for the same purpose, and the innkeeper sends the parcel by which coach he pleases.

In assumption against carriers for the loss of a parcel above the value of 10*l.*, they cannot give in evidence, under non-assumpsit, that the value was not declared at the time of delivery.—*Syns v. Chaplin*, 1 N. & P. 129.

CERTIORARI.

1. (*To remove road indictment*.) A certiorari will not be granted to remove an indictment for the obstruction of a highway, on an affidavit that difficult questions of law may arise; some specific difficulty in point of law should be shown.—*Re v. Joel*, 1 N. & P. 28.

2. (*Costs.*) The Court of King's Bench has no power to award costs in criminal proceedings in a court below, although those costs may have been incurred by the defendant's improperly suing out a certiorari, which was afterwards quashed. (1 Ad. & Ell. 603.)—*Rex v. Higgins*, 1 N. & P. 50.
3. (*From Central Criminal Court.*) The Court will not remove an indictment from the Central Criminal Court by certiorari, on the ground that a difficult question of law will arise.—*Rex v. Templar*, 1 N. & P. 91.
4. (*To remove order of justices.*) The 13 G. 2, c. 18, s. 5, directs that no order of justices shall be removed, unless the certiorari be applied for within six months after the order is made. Where an act of parliament directs justices to make an order, and that it should be subsequently confirmed by an order of sessions, the period of six months is to be calculated from the date of the confirmation. (3 B. & Ald. 414; 10 B. & Cr. 477.)—*Rex v. Justices of Middlesex*, 1 N. P. 92.
5. (*For removal of road indictment.*) The rule for a certiorari for removing an indictment for non-repair of a road from an inferior jurisdiction, is nisi in the first instance.—*R. v. Inhabitants of Leeds*, 5 D. P. C. 123.

CHURCH-BUILDING ACT.

The 59 G. 3, c. 134, s. 40, authorizes the churchwardens, for the purpose of re-building or enlarging parish churches, to borrow money upon credit of the church rates, and to make rates for the payment of the interest of the sum borrowed; and for providing a fund of not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof; or for repaying such principal in such manner, and at such times and in such proportions as shall be agreed upon with any person advancing such money. A. lent to the churchwardens of B., under the above act, 1000*l.* at 5*l.* per cent., and agreed not to call in the principal for twenty years: Held, that the act was compulsory on the churchwardens to raise annually a sum equal to the amount of the interest, as a fund for the repayment of the principal, although A. could not compel the repayment of the principal until the expiration of the twenty years.

The churchwardens may use the fund raised annually for the liquidation of the principal, for the benefit of the parish.—*Rex v. Churchwardens of St. Michael's, Pembroke*, 1 N. & P. 69.

CHURCH RATE.

Notwithstanding the 53 G. 3, c. 127, s. 7, the Ecclesiastical Courts have original jurisdiction to enforce the payment of a church rate under 10*l.*, where the validity of the rate is questioned by the party rated.—*Bodenham v. Ricketts*, 6 N. & M. 170.

CHURCHWARDENS.

1. (*Leases by.*) Leases by the churchwardens of A., in which the demised premises are described as parcel of the lands of the parish church of A., and payment of rent to them, are *prima facie* evidence that the premises are parish property. Nor does it make any difference that the leases are expressed to be made by the churchwardens, with the consent and approbation of the vicar and major part of the aldermen and burgesses, and of the

inhabitants and parishioners, and that the leases are indorsed with a memorandum, expressing the consent of certain parishioners, whose names are subscribed. (*Doe d. Higgs v. Terry*, 5 N. & M. 556.)—*Doe d. Higgs v. Cockell*, 6 N. & M. 179.

2. The 59 G. 3, c. 134, s. 14, which authorizes churchwardens to borrow on the credit of the church rates, for defraying the expense of repairs to the church, contemplates *future* expenses only, and not such as have been already incurred.

When money is borrowed by churchwardens under this statute, the instalments of "not less than ten per cent. of the principal sum" ought to be *annual*.—*The King v. Churchwardens of Dursley*, 6 N. & M. 333.

COMPENSATION.

1. (*Under Railway Act*.) A lessee, who had expended large sums upon the demised premises, under a reasonable expectation of a renewal of his lease, was held not therefore to be entitled to compensation in respect of such improvements, where the land was taken from him by a railway company, under a statute directing compensation to be paid to the owners and occupiers of land through, under, in, or upon which the works thereby authorized should be made, for the value of such land, and also for the damages sustained by them in making such works.—*The King v. Liverpool and Manchester Railway Company*, 6 N. & M. 186.
2. Where, by a local act, trustees were empowered to take and use lands, &c., for the purpose of making a road, "making or tendering satisfaction to the owners or proprietors of all private lands, &c., so taken and used, for the same, or any loss or damage they might sustain thereby:" Held, that satisfaction must be made by the trustees, not to the owners of the inheritance only, but to all persons having any estate or interest in the land, who might sustain loss or damage by reason of the lands being taken and used.—*Lister v. Lobley*, 6 N. & M. 340.

CONTRACT.

- (*Of demise, waiver of delivery of possession under*.) Declaration on a contract to demise and deliver possession of a house, out-buildings, &c. on a certain day: breach, in non-delivery of possession. Plea, that the principal subject-matter of the contract was in the defendant's own occupation, and that he was always ready and willing, and able to demise and deliver possession of the same to the plaintiff: that the residue of the tenements was occupied by certain persons as tenants to the defendant, and that at the time of making the agreement, it was agreed that the defendant should not cause the tenants to quit, but that on the defendant's completing the agreement, they should attorn to him and become his tenants; and that the plaintiff then discharged the defendant from giving the plaintiff actual possession thereof: Held, that, in the absence of direct evidence of such an agreement as was set forth in the plea, proof that the plaintiff knew that these tenements were occupied by weekly tenants, and that he did not give the defendant to understand that he should require to be put in actual possession of them until the very moment when the parties had met for the purpose

of concluding the bargain, and when there was not sufficient time left to obtain possession from the tenants, might properly be left to the jury as entitling them to consider whether the plaintiff did not assent to waive a literal performance of the contract, and accept the occupation of the tenants in lieu of an actual delivery of possession.—*Palmer v. Temple*, 6 N. & M. 159.

COPYHOLD.

1. (*By whom surrender to be taken.*) The castle of F. being parcel of the manor of F.: Held, that a custom of the manor for the clerk of the castle, who was appointed by the lord of the manor, to take surrenders of copyholds in the manor of F., concurrently with the steward of the manor, was a legal custom.—*Doe d. Stilwell v. Mellish*, 1 N. & P. 30.
2. Where there are two claimants by different titles to a copyhold tenement, the lord must admit both.—*Rex v. Lord of the Manor of Herham*, 1 N. & P. 53.
3. (*Fine.*) A devisee of copyhold paid the full fine due by the custom of the manor, on his admittance to hold in fee. He afterwards surrendered to the use of himself for life, with remainders over; and on being admitted to such life estate, paid a nominal fine of 1s.: Held, that without a custom to such effect, the remainder-man was not liable, on the death of the tenant for life, to pay any fine. (5 East, 322; 8 Bingh. 439.)—*Phypers v. Eburn*, 3 Bingh. N. C. 250.
4. (*Mandamus to admit to.*) Where it is clear that by the provisions of the 3 & 4 W. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the Court will not compel the lord by mandamus to admit him.—*Rex v. Lord of the Manor of Agardsley*, 5 D. P. C. 19.

CORPORATION.

1. (*Notice of meeting.*) A public body (as a corporation) entrusted with the performance of a public duty, cannot hold an extraordinary meeting, unless all the members be summoned who can be summoned, or the members not summoned are actually present at the meeting.

A custom to hold such a meeting on summons of all the members, subject to a qualification that the accidental omission of service of the summons should not vitiate the meeting, was held bad in law. And a general dispensation by one of the body, with service on himself, is void.

The proceedings at a meeting at which any individual of the body is not present who might have been summoned and was not, are void, though the omission was accidental, and though the individual had given a general notice that he wished not to be summoned. (Cas. temp. Hardwicke, 147; 4 B. & C. 426.)—*Rex v. Langhorne*, 6 N. & M. 202.

2. (*Corporate meeting.*) A corporate meeting of a corporation in which two bailiffs and twelve assistants constitute the governing body, is not valid without the presence of the two bailiffs and seven of the assistants.—*Bailiffs of Godmanchester v. Phillips*, 6 N. & M. 211.

And see WITNESS, 2.

COSTS.

1. In an action on a bill of exchange drawn in London, where the witnesses and parties all resided, the plaintiff laid the venue in Surrey: Held, that, unless a case of oppression were made out, he was entitled to the costs of going to the assizes, notwithstanding the case might have been tried at less expense in London.—*Vere v. Moore*, 3 Bingh. N. C. 261.
2. (*On nolle prosequi*.) Where a *nolle prosequi* is entered as to part of the sum claimed in the declaration, the defendant is entitled to his costs under 3 & 4 W. 4, c. 42, s. 3, which gives costs on a *nol. pros.* entered as to any part of a declaration. And after such *nol. pros.*, it is too late to contest the propriety of the pleas.—*Williams v. Sharwood*, 3 Bingh. N. C. 331.
3. (*Setting off*.) On a reference to arbitration of an action of ejectment, and all matters in difference between the parties, the arbitrator directed that a sum of 50*l.* should be paid by the lessor of the plaintiff to the defendant, by way of compensation for certain buildings erected by them, and that a verdict should be entered for the lessor of the plaintiff. On motion, the Court directed the sum awarded to the defendant to be set off against the costs of the lessor of the plaintiff, saving the lien of the defendant's attorney. (1 M. & Scott, 366.)—*Doe d. Swinton v. Sinclair*, 3 Scott, 42; 5 D. P. C. 27.
4. (*On writ of inquiry*.) On writs of inquiry before the sheriff, where the damages are under 20*l.*, the costs are taxed on the same scale as on trials before the sheriff.—*Hooppell v. Leigh*, 3 Scott, 188; 5 D. P. C. 40.
5. (*Under 43 G. 3, c. 46.*) After a defendant had been arrested for 200*l.* by an attorney, he applied to have the plaintiff's bill taxed, which was ordered upon the terms of the plaintiff being at liberty to sign judgment for the amount taxed, and the defendant undertaking to pay that amount and the costs of the action; the master allowed upon taxation 149*l.* only, but disallowed 60*l.* actually expended by the plaintiff in preparing briefs, &c. in great haste by the defendant's direction, upon which extra charges were made by the copyists: Held, first, that the plaintiff had a probable cause for the arrest; and secondly, that the defendant was estopped by the terms of the order from complaining of the arrest.—*Watkins v. O'Gorman Mahon*, 1 M. & W. 722; 5 D. P. C. 178.
6. (*On new assignment*.) In case, the defendant pleaded the general issue, and justified under a right, which the plaintiff traversed. The plaintiff afterwards obtained an order to amend upon payment of costs, and withdrew the traverse, and new assigned excess; the defendant confessed the new assignment, and withdrawing so much of the general issue as applied to that part of the declaration new assigned, paid into Court 10*l.*, which the plaintiff took out. The Master allowed the plaintiff the costs of the writ, and of the new assignment and subsequent proceedings, but gave the defendant the other costs, and the general costs of the cause: Held, that the Master was right. *Quare*, whether the plaintiff was not entitled to some portion of the declaration, if it could be ascertained?—*Griffiths v. Jones*, 1 M. & W. 731; 5 D. P. C. 167.

7. Assumpsit for work and labour, &c. Pleas, first, except as to 15*l.* 15*s.* 7*d.*, non assumpsit; second, as to 52*l.* 12*s.*, parcel, &c., payment; third, as to 52*l.* 12*s.*, other parcel, &c., that the work was done on a special contract, subjecting the plaintiff to a deduction for certain damage, and that such damage amounted to that sum; fourthly, as to 20*l.*, other parcel, &c., a set-off; and fifth, payment into Court of 15*l.* 15*s.* 7*d.* Issues being joined on the four first pleas, the verdict was found for the plaintiff on the general issue for 73*l.* 18*s.* 10*d.*; on the second issue, for the defendant; on the third, for the defendant as to 20*l.*; and on the fourth, for the defendant as to 5*l.* 6*s.*: Held, that the defendant was entitled to the general costs of the cause.—*Probert v. Phillips*, 2 M. & W. 40.
8. (*On certificate under 43 Eliz. c. 6.*) To a declaration for a libel, the defendant pleaded the general issue, and two special pleas. At the trial the jury found all the issues for the plaintiff, with 1*s.* damages, and the judge certified under the 43 Eliz. c. 6, s. 2: Held, that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the rule of H. T. 4 W. 4, s. 7.—*Simpson v. Hurdiss*, 2 M. & W. 84.
9. (*Demand of, on allocatur.*) Where costs in the cause are directed by the Master's allocatur to be paid by one party, a demand of them by the attorney of the other party is sufficient.—*Cor v. Salmon*, 2 M. & W. 127.
10. (*Treble costs to parish officers.*) A parish officer sued in trespass for distraining for poor rates, is not entitled, under the 43 Eliz. c. 6, s. 19, or 13 & 14 Car. 2, c. 12, s. 20, to treble costs, when the plaintiff is nonsuited. (1 B. & B. 519.)—*Charrington v. Meatheringham*, 2 M. & W. 142.
11. (*Notice of taxation.*) Though a defendant may have appeared in an action, and the plaintiff taxes his costs, without giving notice of taxation, that is not an irregularity sufficient to induce the Court to set aside a judgment and subsequent proceedings. (1 D. P. C. 300.)—*Lloyd v. Kent*, 5 D. P. C. 125.
12. (*Under 43 G. 3, c. 56.*) If a cause and all matters in difference are referred to an arbitrator, and he makes a separate adjudication as to the action, the defendant is not precluded from applying for his costs under the 43 G. 3, c. 46, on the ground of other matters in difference being referred in the same submission. (3 B. & C. 491; 6 B. & C. 193.)—*Jones v. Jehu*, 5 D. P. C. 130.
13. (*Security for.*) It is not necessary for a defendant to show the stage of the proceedings, in order to obtain a rule *nisi* for security for costs. (2 C. & J. 207.)—*Cole v. Beardy*, 5 D. P. C. 161.

And see MIDDLESEX COURT OF REQUEST'S ACT; PRACTICE, 7; TRESPASS, 2. COVENANT.

1. (*For repair.*) A covenant to keep and leave a house in good and tenantable repair, is satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise. (Moo. & Ry. 173, 334.)—*Stanley v. Tougood*, 3 Bingh. N. C. 6.

2. (*Independent covenants.*) The plaintiff, as captain of a South Sea whaler, covenanted with the defendants that he would proceed to the fishery, and procure a cargo of sperm oil, &c. or as great a proportion as it might be, under all circumstances, within his power to obtain; that he would return to London, and at his own cost deliver the cargo; would obey instructions; be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit any on board to do so. The defendants covenanted, on the performance of the before-mentioned terms and conditions on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo: Held, that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendants' covenant. (10 East, 295; 1 H. Bl. 273, n.)—*Stavers v. Curling*, 3 Bingh. N. C. 355.

3. (*By assignee of reversion.*) A declaration in covenant stated that one J. H. was seised in fee, and being so seised, by a certain indenture, with the consent and approval of the said J. H. then given, made between the said J. H. of the one part, and the defendant of the other part, (profert, sealed with the seal of the defendant,) it was witnessed, that, for the considerations therein mentioned, he, the said J. H., did demise to the defendant, his executors and administrators, certain premises therein mentioned; to hold to him, his executors, &c., for the term of eleven years. By virtue of which said indenture, and by permission of the said J. H., the defendant afterwards entered into the premises, and was possessed thereof. That J. H. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to the plaintiff for life. It then averred the death of J. H., and afterwards of E., his wife, whereupon the said plaintiff became and was seised of the reversion of and in the premises in his demesne as of freehold for the term of his natural life, under and by virtue of the will. The defendant pleaded in effect that, although the deed was his deed, yet that it was not signed by J. H., nor by any agent of the said J. H. thereunto lawfully authorized by writing, nor was any lease for the said term of eleven years put into writing and signed by J. H., or any agent, &c.: Held, on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture.—*Cardwell v. Lucas*, 2 M. & W. 111.

CROWN DEBTOR.

(*Writ of diem clausit extremum.*) Where a crown debtor has died insolvent, a motion for a writ of *diem clausit extremum* is absolute in the first instance.—*Res v. Lord Crewe*, 5 D. P. C. 158.

CUSTOM.

A custom for public warehouse keepers in London to have a general lien on all goods from time to time housed in their warehouses, for and in the name of the merchants or other persons by whom such public warehouse keepers are employed, for all monies or any balance thereof due from such merchants or other persons to such warehouse keepers, for expenses incurred by such warehouse keepers about goods consigned from abroad, was

held void. (3 Bos. & P. 42; 7 East, 224; 1 W. Bl. 413; 5 B. & Ald. 350; 1 Esp. 109; 3 Esp. 81.)—*Leuckhart v Cooper*, 3 Bing^h. N. C. 99.

CUSTOMS ACTS.

The condition of a recognizance to pay the seizing officer the costs occasioned by a claim, is broken by the non-payment to the seizing officer of the general costs of resisting the claim, though such costs are not incurred personally by the seizing officer.—*Rex v. Bullock*, 1 M. & W. 726.

DEED.

(Construction of—What passes under the word “appurtenances”) Under the word “appurtenances” in a deed, an easement which, though enjoyed *de facto*, has no legal existence, (as where it has become extinct by unity of possession,) does not pass. But in a deed to lead uses, the word “appurtenances” is not to be taken in its strict technical sense, where in creating the seisin to serve such uses the deed creates an easement *de novo*, to which alone the use of that word can be referred. Therefore, where A. and B., co-parceners, conveyed to C. two estates, P. and W., together with all ways “therewith usually held, used, occupied, or enjoyed,” to the use, as to P. and the appurtenances, of A. and his heirs, and as to W. and the appurtenances, of B. and his heirs: Held, on error, (reversing the judgment of the K. B.), that a way used before the partition, from P. over W., vested in A.—*James v. Plant*, 6 N. & M. 282.

DEMURRAGE. See PLEADING, 2.

DEVASTAVIT.

If a defendant executor plead to the action, and do not plead *plene administravit*, the judgment against him is evidence of a devastavit; and if, after the production of such judgment upon a *scire fieri* inquiry, the sheriff returns *nulla bona testatoris*, the Court will quash the return, and award a new *scire fieri* inquiry.—*Palmer v. Waller*, 1 M. & W. 689; 5 D. P. C. 172.

DEVISE.

1. The case of *Doe d. Savile v. Earl of Scarborough*, 8 Ad. & Ell. 3; 4 N. & M. 274; 15 L. M. 168, was reversed in the Exchequer Chamber, the Court holding that the recovery defeated the limitations expectant on the estate tail.—*Earl of Scarborough v. Doe d. Savile*, 3 Ad. & Ell. 897.
2. A testator by his will devised different estates, consisting of houses and land, to different devisees, (some of whom were of his own name,) to some in fee, and to others for life only; and by a residuary clause, devised all the rest, residue, and remainder of his messuages, land, &c., not therein before disposed of, to his wife, her heirs, executors, administrators, and assigns for ever. The following clauses were added by the testator, immediately before executing the will—“I do further give to my wife, this house wherein I now live; also the cottage, and all the building, cattle, and everything belonging to me in and about this house.”—“I also entail my land to the Spencers’ male heir so long as one shall remain.” The testa-

tor's own name was Spencer: Held, that the devise to the wife of the residue was not affected by the subsequent specific devise, or by the devise to the Spencers' male heir; that the devise of the residue, and the specific devise to the wife, were not inconsistent, and might both stand together; and that the clause as to the entail, was either unintelligible, or inapplicable to the property devised to the wife.—*Doe d. Spencer v. Pedley*, 1 M. & W. 662.

3. (*When legal estate in trustees—Patent and latent ambiguity.*) A testator, by will dated in March, 1807, devised to trustees (not using words of inheritance) all his lands in B., on trust to permit his wife to enjoy them for her life, and after her decease, on trust out of the rents and profits to pay his brother an annuity of 10*l.* for five years, if he should so long live. The testator then devised a house to John Gord, the son of George Gord; another to George Gord, the son of George Gord; and a third (after the expiration of certain life estates) to *George Gord the son of Gord*. He bequeathed also legacies amounting in the whole to 65*l.*, George Gord and John Gord, the sons of George Gord, being two of the legatees, the legacies to be paid by the trustees when the legatees should attain the age of twenty-one years; and he appointed his wife sole executrix: Held, that evidence of the testator's declarations was admissible to show that he intended that the house devised to "George, the son of Gord," should go to George, the son of George Gord: Held, also, that the trustees took a chattel interest in the devised lands, either until the legacies were paid, or until the legatees had all attained twenty-one.

If, in ejectment by a devisee, it is objected at *Nisi Prius* that the legal fee is in trustees named in the will, but the Court is of opinion that they took a *chattel interest*, the defendant will not be allowed to avail himself of this objection, so as to have a new trial, inasmuch as if the objection had been correctly stated at the trial, the plaintiff might have removed it by showing that the chattel interest was determined.—*Doe d. Gord v. Needs*, 2 M. & W. 129.

DISTRESS.

1. (*Excessive distress—Pleadings.*) To a declaration for an excessive distress for rent, the defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country; on which the plaintiff joined issue: Held that, on this issue, the defendant was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due and had been distrained for. And this, although on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; and although, on the second distress, the defendant stated that it was for rent due since the last distress.—*Gambrell v. Earl of Falmouth*, 4 Ad. & Ell. 73.
2. (*For apportioned rent.*) A lessee of one hundred acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor,

and that person kept possession of the eight acres, until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease: Held, on error, (reversing the judgment of the Court of Exchequer,) that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it.—*Neale v. Mackenzie*, 1 M. & W. 747.

DOWER. See **ESTOPPEL**.

ECCLESIASTICAL COURTS.

1. (*Prohibition to.*) Where in a suit in an Ecclesiastical Court the libel contained several articles, some of which comprised articles cognizable at common law, but which were not objected to by the defendant during the progress of the suit, and the Court in their sentence found that the articles were for the most part proved, and did not particularize in respect of which articles the sentence was pronounced, a prohibition does not lie. If the prohibition had been applied for before sentence, such of the articles only would have been removed as contained matter cognizable at common law. (5 B. & C. 400; 2 Ld. Raym. 1507.)—*Hart v. Marsh*, 1 N. & P. 62.
2. (*Same.*) The Court will not grant a prohibition to an Ecclesiastical Court after sentence pronounced, where it does not appear, either by direct evidence or presumption of law, that any steps are taken or contemplated to enforce it, although a significavit issuing upon it may have been quashed. (1 T. R. 556; 5 B. & C. 27.)—*Bodenham v. Ricketts*, 5 D. P. C. 120.
3. (*Same.*) Prohibition lies to the Consistory Court, if it proceeds to hear exceptions at the suit of a legatee, to an inventory exhibited by an executrix. (5 M. & S. 406; 8 Mod. 168; 3 Burr. 1922; 2 Will. Exc. 646.)—*Griffiths v. Anthony*, 1 N. & P. 72.

And see **CHURCH RATE**.

ECCLESIASTICAL LEASE. See **INCUMBENT**.

EJECTMENT.

1. In ejectment by A. against B. and C., where B. defends as landlord of C., a right of possession either in B. or C. will defeat the action. But if it appear that B. has no title, and that C. has no right to the possession except as tenant under A., evidence of a disclaimer by C. of such holding under A., rebuts the defence as to both B. & C.—*Doe d. Mee v. Litherland*, 6 N. & M. 313.
2. (*Service.*) Service of a declaration in ejectment on the clerk of an incorporated company (not empowered to sue and be sued in the name of their clerk) on a portion of the premises, the clerk not being resident there, held sufficient for a rule nisi.—*Doe d. Ross v. Roe*, 5 D. P. C. 147.

3. (*Same.*) The notice, dated 9th May, 1836, required an appearance "next Easter term," which, literally, would be Easter term 1837. The Court, in Trinity term, granted a rule nisi for judgment against the casual ejector.—*Doe d. Watts v. Roe*, 5 D. P. C. 149.
4. (*Same.*) In an affidavit of service, the word *served* is not indispensably necessary, if it appears from the facts stated in the affidavit that it has been duly served.—*Doe d. Jenkins v. Roe*, 5 D. P. C. 155.
5. (*Bail in ejectment.*) To entitle the lessor of the plaintiff in ejectment to call for bail under the 1 G. 4, c. 87, he must move on production of the original lease or agreement, or a counterpart or duplicate, and the instrument must be stamped at the time. It is not sufficient to move on a copy, or on an original stamped after the rule nisi is obtained, and before cause shown. (3 D. P. C. 277.)—*Doe d. Caulfield v. Roe*, 3 Bingh. N. C. 329.

ELECTION PETITION.

1. (*Form of report of committee—Recognizance—Costs.*) Where the prayer of an election petition is directed against the sitting members, and the petition only incidentally charges the returning officer with misconduct, the returning officer, although he appear before the committee appointed to inquire into the allegations of the petition, is not a *party* to the proceedings, within the meaning of the 9 G. 4, c. 22, s. 36; and the report of the committee is not void because it omits to notice the charge of the returning officer. (4 M. & S. 234.)

It is sufficient if one of several petitioners enters into the recognizance required by the act, and pursues the form given in the schedule.

The certificate of the speaker is conclusive as to the *amount* of costs ordered to be paid by parties whose opposition to a petition has been reported frivolous and vexatious. (3 Ad. & Ell. 381.)—*Ranson v. Dundas*, 3 Bingh. N. C. 123.

ESTOPPEL.

The tenant (in a writ of dower) took lands from the assignees of the demandant's husband, by a deed which described them as freehold: Held, that he ~~was~~ not thereby estopped to prove them to be leasehold.—*Gaunt v. Wenman*, 3 Bingh. N. C. 69.

EVIDENCE.

1. (*To vary written contract by parol—Sale by auction.*) A written document from which a particular contract would in ordinary cases be implied, may be shown by parol to have been made under circumstances which exclude such implication. Therefore, in an action for goods sold at an auction, evidence of prior declarations by the plaintiff, that the defendant was entitled to a legacy of 100*l.*, and that she might buy to that amount and set it off against her legacy, is admissible for the defendant.

The presumption that a party, by bidding at an auction, authorizes the auctioneer to bind him by a contract as a purchaser, on the terms of the conditions of sale, may be rebutted by parol evidence of prior communications between the parties.—*Bartlett v. Parnell*, 6 N. & M. 299.

2. (*Of handwriting by comparison.*) Evidence of handwriting by comparison is inadmissible, except either where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document. (1 C. & J. 47; 1 Esp. 351; 1 M. & R. 133.)—*Doe d. Perry v. Newton*, 1 N. & P. 1.
3. (*Proof of execution of deed—Of livery of seisin.*) It is not necessary to prove the execution of a deed, if the adverse party claims under it; and this rule applies where secondary evidence is given of the deed. And it is sufficient evidence of A. claiming under a conveyance, so as to dispense with proof of the execution by the subscribing witness, to show that B., an attorney, was in possession of the property and of the conveyance, that he sold the property to A., and on that occasion handed over the conveyance to him. (6 B. & C. 28.)
It is not necessary to prove livery of seisin to a feoffment, where the adverse party claims under the feoffee.—*Doe d. Rowlandson v. Wainwright*, 1 N. & P. 8.
4. (*Declarations of party deceased.*) In trover for a watch, the defendant pleaded that it was not the property of the plaintiff; and proved that it had been in his, the defendant's, possession for four years previous to the death of a former owner; and he put in evidence also letters of administration granted to him of the effects of such former owner: Held, that the declarations of that owner were evidence against him. (1 Taunt. 141.)—*Smith v. Smith*, 3 Bingh. N. C. 29.
5. (*Confidential communication to attorney.*) Trover for a lease by the assignees of a bankrupt.—Plea, that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security for money which the bankrupt then owed him. At the trial, the plaintiffs attempted to show that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise him money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time: Held, that this was privileged from disclosure, as being a confidential communication made to him relative to his character as an attorney.—*Turquand v. Knight*, 2 M. & W. 98.

EXECUTOR AND ADMINISTRATOR.

1. (*Scire facias by executors.*) In *sci. fa.* by executors to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only have proved it; since executors derive their title from the will, and not from the probate. (Com. Dig. Pleader, (2 D. 1); Bro. Abr. Executor, pl. 37; 1 Salk. 3; 1 Moo. & M. 362.)—*Scott v. Briant*, 6 N. & M. 381.
2. (*Plea of judgment recovered puis durrein continuance.*) A defendant executor does not preclude him, by referring a cause, from availing himself of a plea of judgment recovered *puis darrein continuance*, while the reference was pending, although it appears from affidavits that he has a

certain amount of assets in his hands. (5 Taunt. 665.)—*Alder v. Park*, 5 D. P. C. 16.

And see DEVASTAVIT.

FIXTURES.

Where a tenant removed the soil of the demised land, and placed therein stone saddles, in some places with a brick foundation, and erected on the saddles a thatched wooden barn, which was kept in its place on the saddles by the pressure of the superincumbent weight alone: Held, that he might maintain trover for the woodwork and thatch. (3 East, 38; Bull. N. P. 34; 2 East, 88; 2 B. & Ald. 165; 1 B. & Adol. 161.)—*Wansbrough v. Maton*, 6 N. & M. 367.

FORCIBLE DETAINER.

At the time of a conviction for forcible detainer, the defendant tendered to the justices a traverse of the force complained of; and a few days after, an inquisition was held before the magistrates for the purpose of trying the alleged force by a jury, who, after hearing evidence adduced by both parties, found the defendant guilty; and the magistrates then gave restitution. A return was made to the Court of K. B., on certiorari, of the conviction and inquisition. The latter was entitled "an inquisition indented and taken, &c. by the oaths of twelve, &c. before, &c. who say, upon their oaths aforesaid, that, &c." stating an unlawful entry and detainer, but not reciting any complaint made by the prosecutors: Held, that the inquisition was founded on the conviction, and could not be sustained, the conviction having been pronounced void: and that the inquisition, even if looked at alone, was bad, as it did not state any complaint, or by what authority the jury was summoned: Held further, that the Court was bound to award a re-restitution, as a consequence of quashing the conviction, without inquiring into the legal or equitable claims of the respective parties.

The proceedings being returned by certiorari, and the conviction being, on a concilium and argument, pronounced bad, the Court would not, as a consequence of that judgment, quash the inquisition also, but heard its validity separately discussed on motion.—*Re v. Wilson*, 3 Ad. & E. 817.

GAMING.

An agreement whereby the defendant sold the plaintiff a horse for 200*l.* if he trotted eighteen miles within the hour, but for 1*s.* if he failed to do so; Held illegal and void.—*Brogden v. Marriott*, 3 Bingh. N. C. 88.

GOODS SOLD AND DELIVERED.

A., a dealer in china, being insolvent, assigned his business and his stock in trade to his brother B., who was a carver and gilder, and entered into a composition with his creditors to pay them 5*s.* in the pound; his brother B. undertaking to pay 2*s.* 6*d.* in the pound, and he himself the remainder. A. continued to manage the business in the shop for his brother, B.'s wife occasionally going there, and B.'s name appearing over the door. One of A.'s creditors applied to him at that shop, and pressed for payment of

his share of the composition. A. offered a bill of exchange in payment, on which the brother's name had been put, but without his authority, as indorser, and as the amount exceeded the amount due for the composition, A., and B.'s wife, who was then in the shop, proposed that goods should be supplied to the shop for the amount of the balance, which was agreed to, and goods were accordingly sent to the amount of the balance. The bill having been dishonoured, B. was sued, and pleaded that he never indorsed the bill, and that no notice of dishonour had been given to him; and the jury found both those issues in his favour. Evidence was given that B. had held himself out as responsible for all orders given at that shop. The jury found that A. had a general authority to buy goods for B., and that the plaintiff did not sell the goods on the credit of the bill alone, but on the credit of B.:—Held, that the value of the goods sent was recoverable on a count for goods sold and delivered, in the action against B.—*Rose v. Edwards*, 1 M. & W. 734.

HABEAS CORPUS. See PRISONER, 5.

HIGHWAY.

(*Order for diversion.*) An order of justices under the 55 G. 3, c. 68, for diverting a public footway, and substituting a new one, which contains also an order for the stopping up of the old footway, is void; there should be a separate order for the stopping up. (10 B. & C. 477.)—*Rex v. Justices of Middlesex*, 1 N. & P. 92.

And see CERTIORARI, 5.

HUSBAND AND WIFE.

1. (*Acknowledgment by married woman—Commissioners' lien for fees.*) Commissioners for taking acknowledgments of married women have a lien for their fees on the deed, certificate of execution, &c.—*Ex parte Grove*, 3 Bingh. N. C. 305.
2. (*Liability of married woman on her contracts—Pleading.*) To a declaration in assumpsit for goods sold and delivered, the defendant pleaded her coverture. The plaintiff replied, that the husband was an alien, and never was within this kingdom; that the causes of action accrued to the plaintiff, and the promise was made by the defendant, within the realm of England, while she lived separate and apart from her husband as a single woman, and that the plaintiff did not give any credit to the husband, but contracted with the defendant as a feme sole, on her own credit and responsibility; and that she made the promise in the declaration mentioned as such feme sole. Rejoinder, that the husband was not an alien, nor did the causes of action accrue to the plaintiff, nor was the promise made by the defendant, while she lived separate and apart from her husband as a single woman; nor did the plaintiff contract with the defendant as a feme sole, and on her own credit and responsibility, nor did she make the promise in the declaration mentioned, in manner and form, &c., on which issue was joined: Held, that on this issue the plaintiff was bound to prove that the defendant represented herself to the plaintiff as a feme sole, or that he dealt with her believing her to be such.

Held, also, that evidence of the defendant's dealings with other tradesmen, to whom it was alleged she had held herself out as a single woman, was not admissible, unless her representations to them were so made as to come to the plaintiff's knowledge.—*Barden v. Mary de Keverberg*, 2 M. & W. 61.

3. (*Acknowledgment of deed by married woman.*) The affidavit verifying the certificate of a married woman's acknowledgment of a deed, may be made by one of the commissioners who took the acknowledgment, provided he be a practising attorney, and one of the commissioners have no interest in the matter.—*In re Scholfield*, 3 Bing. N. C. 293.

ILLEGAL CONTRACT. See STOCK-JOBING ACT.

INCLOSURE ACT.

Where a local inclosure act, for inclosing certain open fields, provided that the several lands and grounds to be awarded and allotted to the several persons concerned, and the several messuages, lands, &c. which should be exchanged in pursuance of that act or of the General Inclosure Act, immediately after such allotments and exchanges were made, should be, remain, and enure to the several allottees, who should from thenceforth stand and be possessed thereof, to such and the same uses, estates, trusts, and purposes as the several messuages, &c. in lieu of which the allotments were made, were held by, &c.: Held, that an allottee, on being put in possession of an allotment by the commissioners under the act, acquired immediately, and before any award executed, the same legal estate in it as he had in his ancient messuage. (2 B. & Ald. 171; 17 Ves. 468; 5 Bingh. 441; 9 B. & C. 789.)—*Doe d. Harris v. Saunders*, 1 N. & P. 119.

INCUMBENT.

(*Concurrent lease by, when void.*) A vicar made a lease for twenty-one years from the date, of messuages in the city of London, of which the dwelling-house used for the habitation of the vicar formed no part, and the ground demised was less than ten acres. At the time it was granted, a former lease of the same premises, for forty years, was in being, but was within three years of its expiration: Held, that the second lease was not void under either of the restraining statutes, 13 Eliz. c. 10, s. 3, and 14 Eliz. c. 11, s. 17, and 18 Eliz. c. 11, s. 2. (Ventr. 244; Cro. Eliz. 564; Hob. 269; Carter, 9; 10 Rep. 59.)—*Vivian v. Blomberg*, 3 Bing. N. C. 311.

INFORMATION.

(*Of intrusion, venue in—Proof of title of crown—Prayer of tales.*) In an information of intrusion, the crown may of right lay the venue in any county, or have the inquisition taken in a different county from that in which the venue is laid. (Ventr. 17; Savile, 12.)

The title of the crown to lands of which it has been out of possession for twenty years, may be tried in the information of intrusion itself, and need not be first found by inquest of office; the only effect of the

stat. 21 Jac. 1, c. 14, being, to throw the onus of proving title in the first instance, in such case, on the crown.

Semble, that in an information at the suit of the Attorney-General, a tales may be prayed for the crown without his warrant, though he be not present; but not for the defendant.—*Attorney-General v. Parsons*, 2 M. & W. 23; 5 D. P. C. 165.

INSOLVENT.

1. (*From what debts discharged.*) Under the 7 G. 4, c. 57, s. 50, an insolvent is discharged from damages and costs on a judgment in an action of *tort*, signed after the filing of his petition, the verdict having been obtained before it. (6 Bing. 291.)—*Goldsmid v. Lewis*, 3 Bingh. N. C. 46.
2. (*Warrant of attorney given by.*) A defendant who had taken the benefit of the Insolvent Debtors' Act, induced one of his creditors to give him fresh credit by executing a warrant of attorney for the old and the new debt. The Court set aside a judgment signed on the warrant of attorney, to the extent of the old debt.—*Smith v. Alexander*, 5 D. P. C. 13.

INSURANCE.

1. (*Consolidation of actions.*) Actions on policies of insurance may be consolidated before declaration.—*Hollingworth v. Brodrick*, 6 N. & M. 240.
2. (*Total loss—Abandonment.*) The case of *Roux v. Salvador* (1 Bingh. N. C. 526; 13 L. M. 463), was reversed in the Exchequer Chamber; the Court holding that the plaintiff might recover as upon a total loss, without abandonment.—*Roux v. Salvador*, 3 Bingh. N. C. 266.

And see PROBATE.

INTERPLEADER ACT.

1. On an interpleader rule obtained by the sheriff, neither the plaintiff nor the claimant appearing after service of the rule, the Court ordered so much of the goods to be sold as would satisfy the sheriff's charges, and the rest to be abandoned.—*Eveleigh v. Salisbury*, 3 Bing. N. C. 298.
2. Where a sheriff has applied to the Court under the Interpleader Act, and his rule is discharged, he is entitled to a reasonable time for the return of the writ after the rule is disposed of, before an attachment can issue against him.—*Rex v. Sheriff of Hertfordshire*, 5 D. P. C. 144.
3. The Court will not interfere to relieve the sheriff under the Interpleader Act, where the proceeds of the levy have been paid over to the execution creditor, although the sheriff may be willing to bring a similar amount into Court. (2 C., M. & R. 289.)—*Ireland v. Bushell*, 5 D. P. C. 147.
4. The Court has no jurisdiction, under the first section, to interfere in an action where the declaration contains a count in case as well as a count in trover.—*Lawrence v. Mathews*, 5 D. P. C. 149.

INVENTORY. See ECCLESIASTICAL COURT, 3.

LANDLORD AND TENANT.

1. (*Disclaimer.*) Where, on a question as to the right of possession on a particular day, one party entitles himself to the possession by a tenancy

for years under the other, an acknowledgment, made after action brought, of an attornment to a stranger before such day, (*e. g.*, in ejectment, before the day of the demise), is sufficient evidence of a disclaimer to rebut his title as tenant.—*Doe d. Mee v. Litherland*, 6 N. & M. 313.

2. A. let to B. a furnished house, at a certain rent payable in advance, from a certain future day, and agreed that it should be furnished suitably for a school: Held, that the suitable furnishing of the house was a condition precedent to the right to demand the rent, and that, B. having entered, and the house not being so furnished, A. could not distrain.—*Mechelen v. Wallace*, 6 N. & M. 316.
3. (*Surrender by operation of law—Disclaimer.*) A tenant who occupied a house as tenant from year to year, entered into the following agreement with his landlord:—"1831, Sept. 2, S. S. (the tenant) purchased an estate in the parish of Corbey, bought of R. G. (the landlord) at the sum of 100*l*. Received on account, 10*s*. Mr. R. G. is willing to let the sum lie, by paying 4 per cent.": Held, that as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law.—*Doe d. Gray v. Stanion*, 1 M. & W. 695.
4. A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase money, the agent of the lessor applied to him to give up possession. To which he answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it:" Held, that this was no disclaimer; because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year.—*Doe d. Marquis of Hertford v. Hunt*, 1 M. & W. 690.

LEASE. See STAMP, 1.

LIBEL.

1. (*Evidence under not guilty.*) Under the plea of not guilty, in libel, the defence of *privileged communication* may be set up.—*Lillie v. Price*, 1 N. & P. 16.
2. (*Privileged communication.*) Communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, are not privileged.—*Martin v. Strong*, 2 M. & W. 29.
3. On a plea to a declaration for libel, the issue was made up of three material facts. During the summing up of the judge, the jury expressed themselves satisfied as to one of those facts, in favour of the plaintiff; and the judge told them, that in order to find for the defendant on that issue, they must be satisfied that all the three facts were proved in substance. The jury, after long deliberation, found on that issue a verdict for the defendant. The Court refused to disturb the verdict.—*Napier v. Daniel*, 3 Bing. N. C. 77.

LIMITATIONS, STATUTE OF.

An action of assumpsit for unliquidated damages is within the saving clause (s. 7) of the 21 Jac. 1, c. 16. Therefore such action, accruing while the plaintiff is in prison, may be brought at any time within six years from the first time of his being at large; or it may be commenced while he continues in prison, or before his enlargement, although more than six years after the cause of action accrued. (2 Saund. 120; 2 Mod. 71.)—*Piggott v. Rush*, 6 N. & M. 376.

LORDS' ACT.

An affidavit of service of notice on a creditor under the compulsory clause of the Lords' Act, 32 Geo. 2, c. 28, s. 16, is not sufficient, if it state merely that the notice was left with the landlady of the house where he lodges; or with a person at the house where he resides, who afterwards stated that she acted as his servant, and had delivered it to him, she herself making no affidavit, and there being no affidavit of belief that the statement of such person was true.—*Robinson v. Gompertz*, 4 Ad. & E. 82.

LUNATIC. See ACCOUNT STATED.

MANDAMUS. See OFFICE; POOR RATE.

MIDDLESEX COURT OF REQUESTS ACT.

A plaintiff is liable to costs under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 17, where he recovers less than 40s., though his claim was reduced below that sum by the statute of limitations being pleaded.

But where the declaration was in debt for work and labour, and it appeared that the work and labour consisted of the levying of an execution by the plaintiff, as a broker, on the goods of a party resident in Surrey: Held, that this was not cognizable by the Court of Requests, though the defendant resided in Middlesex.—*Bailey v. Chitty*, 2 M. & W. 28.

MONEY HAD AND RECEIVED.

1. Money had and received is not maintainable against the bailee of a bill of exchange not due at the time of action brought, which he has wrongfully deposited with his own bankers, although he has obtained money on the joint credit of that and other bills. (1 Stark. N. P. C. 132.)—*Atkins v. Owen*, 6 N. & M. 309.
2. Where a party makes a claim upon another which he knows to be unfounded, and arrests him for the amount of such claim, and the party arrested pays a portion of the amount absolutely, in order to obtain his discharge, and engages to put in bail for the remainder, the sum so paid may be recovered back in an action for money had and received.—*Duke de Cadaval v. Collins*, 6 N. & M. 324.
3. If A. remits money to B. to pay to C., and B. promises C. to pay it to him, C. can sue B. for it, as for money had and received to his use — *Lilly v. Hays*, 1 N. & P. 26.

MONEY PAID. See **VENDOR AND PURCHASER.**

MORTGAGE. See **STAMP, 2.**

MUNICIPAL CORPORATION ACT.

1. A bankrupt uncertificated at the time of election is not disqualified from being elected a councillor under the Municipal Corporation Act. The disqualification exists only where the bankruptcy occurs during the holding of the office.—*Rex v. Chitty*, 1 N. & P. 79.
2. (*Sheriff of Oxford City, jurisdiction of.*) The sheriff of the county of Oxford has still the execution, in the city of Oxford, of writs from the superior courts. (6 W. 4, c. 76, s. 61.)—*Granger v. Taunton*, 3 Bing. N. C. 64; 5 D. P. C. 190.

NEW TRIAL.

1. The Court set aside, on payment of costs, a nonsuit founded on the non-production of a material document, which, being out of the jurisdiction of the Court, had been sent for in due time, but did not arrive until after the trial. (6 Bing. 753.)—*Atkins v. Owen*, 6 N. & M. 229.
2. The Court will not grant a new trial, after verdict for the defendant against evidence, where the subject-matter of the action is less than 20l.
3. A new trial was granted without payment of costs, where the judge had misinformed the jury on an important matter of fact.—*Haine v. Davey*, 6 N. & M. 356.
4. A jury having found for the defendant, in an action of crim. con., the Court granted a new trial, on the ground that the verdict was against the weight of evidence, though there was some evidence for the defendant; the judge having reported that he was not satisfied with the verdict.—*Mellin v. Taylor*, 3 Bing. N. C. 109.
5. Where the declaration on a bill of exchange omitted the time at which the bill was payable, and the judge at nisi prius refused an amendment, and nonsuited the plaintiff, the Court set aside the nonsuit on payment of costs, the plaintiff to be at liberty to amend, and the defendant to plead de novo.—*Pullen v. Seymour*, 5 D. P. C. 185.

OFFICE.

Where an office is full by the appointment of the person who *prima facie* has the right of appointment, and there are no means of trying the title by action, the Court will not grant a mandamus against the party filling the office, in order to try the title.

Quære, whether an information in the nature of a *quo warranto* will lie for the usurpation of the office of sexton?—*Rex v. Minister and Churchwardens of Stoke Damerel*, 1 N. & P. 56.

OVERSEER. See **PLEADING, 3.**

PARENT AND CHILD.

A father is entitled at law to the custody of his legitimate children, to the exclusion of their mother, though they be within the age of nurture. And when they are in the mother's custody, the Court will compel her to deliver

them to the custody of the father, unless it appear to the Court that they will thereby be improperly restrained, or their morals contaminated. The fact of the father's having formed an adulterous connexion is not of itself sufficient to warrant the Court in refusing to enforce his right to the custody of his children. (5 East, 221; 3 Burr. 1434; 2 Stra. 982; 1 Dowl. P. C. 81.)—*R. v. Greenhill*, 6 N. & M. 244.

PARTICULARS OF DEMAND.

1. In order to obtain particulars in trespass, trover, or on the case, there must be an affidavit stating that the defendant does not know what the plaintiff is going for.—*Snelling v. Chennells*, 5 D. P. C. 80.
2. The defendant is not entitled to demand particulars on a count upon a bill of exchange.—*Brookes v. Farlar*, 3 Bing. N. C. 291.
3. In an action on the case against an attorney for negligence in transacting the assignment of a leasehold belonging to the plaintiff, whereby the plaintiff had to pay damages to the assignee, the Court refused to compel the plaintiff to deliver a particular of his demand.—*Stannard v. Illithorne*, 3 Bing. N. C. 326.

PAVING AND LIGHTING ACT.

(*Action against commissioners under—Form of notice of action.*) Case against the clerk to the commissioners for paving and lighting the town of H. The declaration alleged, that after the passing of a local act, the plaintiff paid the commissioners a sum of money; and thereupon, by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of 1350*l.* paid to them by the plaintiff, did grant to the plaintiff an annuity of 140*l.* out of the rates to arise by virtue of the act, to be paid quarterly: that a quarterly payment was due; that the commissioners had money in their hands arising from the rates, and were requested to pay, and it thereupon became their duty to pay; concluding with a breach in non-payment. A plea, traversing the allegation that it was the duty of the commissioners to pay, was held bad on special demurrer, as tendering a mere issue of law.

Case is the proper form of action against the commissioners under such an act, for such non-payment.

The grant of an annuity by five of the commissioners in these terms—“We five, &c. do grant to A. B. an annuity of ——— out of the rates granted and to arise by virtue of this act,” according to the form prescribed by the act, was held not to raise any personal liability in the grantors as on a contract, the act empowering any five to be a quorum.

A clause in the above act enabled the commissioners to sue and be sued for anything done by virtue or in pursuance of the act in the name of their clerk; and another clause provided, that no action should be commenced against any person for anything done in pursuance of the act, till after fourteen days' notice to the clerk: Held, that this clause applied to misfeazances or malfeazances only, and that an action against the clerk for non-payment of an annuity granted in pursuance of the act, was maintainable without such notice.—*Cane v. Chapman*, 1 N. & P. 104.

PAYMENT INTO COURT. See PLEADING, 5.

PLEADING.

1. (*In debt—Conditional Plea.*) In debt on simple contract, a plea of the Statute of Limitations, purporting to be pleaded to "the supposed debt in the declaration mentioned, *if any such there be*," is bad, as not containing a sufficient confession of the debt to sustain it as a plea in confession and avoidance. (1 C., M. & R. 254; 1 Ad. & Ell. 102.)—*Margetts v. Bays*, 6 N. & M. 228.
2. (*In action on charter-party—What to be specially pleaded.*) In assumpsit for demurrage, on an agreement in the nature of a charter-party, the non-compliance of the plaintiffs with the provisions of the 3 & 4 W. 4, c. 52, s. 108, (requiring that previously to the unlading of goods carried coastwise, a written notice of the ship's arrival with the goods, signed by the master, shall be given to the collector or controller of customs, by the master, owner, wharfinger, or agent of such ship, and proper documents obtained,) should be specially pleaded, and cannot be set up as a defence under the general issue.—*Alcock v. Taylor*, 6 N. & M. 296.
3. (*Evidence under general issue.*) In trespass against overseers for taking a distress for poor rates, every matter of defence may still be given in evidence under the general issue.—*Haine v. Davey*, 6 N. & M. 356.
4. (*Plea of payment.*) A declaration on a charter-party, having also a count on an account stated, assigned these breaches: viz. that the defendant did not load a cargo; that he did not pay £200 for four months' freight; 3dly, that he did not pay £200 found to be due on an account stated. Plea, as to £476: 14s. 7d. parcel of the sums in the declaration mentioned, that defendant paid that sum before action, in satisfaction and discharge of all damages as to that sum: Held bad on special demurrer.—*Lorymer v. Vizeu*, 3 Bing. N. C. 222.
5. (*Evidence under general issue—Effect of payment into Court.*) In debt on simple contract, for an attorney's bill of costs in conducting a suit, evidence is admissible, under the plea of nunquam indebitatus, to show that it was agreed that the suit should be conducted for costs out of pocket. And the case is not altered by the payment of money into Court. (2 C., M. & R. 547; 1 M. & W. 542.)—*Jones v. Reade*, 1 N. & P. 18.
6. (*Effect of special traverse.*) Declaration for carelessly impinging with the defendants' ship against the plaintiffs' bridge, and thereby doing damage to it. Plea, that the plaintiffs improperly narrowed the channel by an obstruction; without this, that the damage was occasioned by the carelessness of the defendants. Held, that under this plea the defendants were entitled to give evidence in disproof of their carelessness, after they had failed to establish the obstruction imputed to the plaintiffs.—*Cross Keys Bridge Company v. Rawlings*, 3 Bingh. N. C. 71.
7. (*Materiality of date.*) In assumpsit, the day alleged for an oral promise is immaterial, even since the new rules.—*Arnold v. Arnold*, 3 Bingh. N. C. 81.

8. (*When plea bad as amounting to the general issue.*) To an indebitatus count for money paid, the defendants pleaded specially circumstances showing that the policy of insurance in respect of which the payments were made, had been so framed as to be entirely unavailing. On special demurrer, on the ground, amongst others, that the plea was argumentative, and amounted to the general issue, the Court inclined to think the plea good, but allowed the plaintiff to withdraw the demurrer and reply *de novo*, without costs.—*Cole v. Le Soeuf*, 3 Scott, 188; 5 D. P. C. 41.
9. (*Issue, when too large.*) In an action on the case for a false return, the declaration alleged that the defendant *seized and took in execution* divers goods and chattels of the value of the monies directed to be levied as aforesaid, and *then levied* the same thereout. The defendant pleaded that he did not seize or take in execution any goods or monies, and levy the monies directed by the said writ to be levied, *modo et formá*: Held, that the plea was bad, as the issue tendered was too large.—*Stubbs v. Lainson*, 1 M. & W. 728; 5 D. P. C. 162.
10. (*Construction of contract.*) In an agreement whereby the defendant contracted with the guardians of a union to supply bread for the use of the poor, he covenanted to supply at a certain price loaves of a certain weight, and the guardians agreed to pay for every quantity of the loaves supplied according to the contract, of which a bill of particulars should be sent with the articles at the time of the delivery, or within a month afterwards: provided, that if the articles should not be of the quality contracted for, or should be deficient in weight, or should be delivered without a bill of particulars, the guardians should be at liberty to return them, and purchase others, charging the defendant with the expense and difference of price. In debt on bond given for the due performance of this contract, the breaches assigned were, first, that the defendant delivered loaves deficient in weight, as and for loaves of a particular weight; the issue on which was, that the defendant delivered them as being of the weight stated:—secondly, that he did not deliver a bill of particulars with such loaves, whereupon the board of guardians returned them, and purchased a fresh supply in their place, and thereby incurred expenses, which the defendant did not make good. To this breach the defendant pleaded, that the delivery of a bill with the loaves had been dispensed with by the agent of the board duly authorized, on which allegation issue was taken. It appeared that the defendant brought a quantity of loaves to the door of the workhouse in a cart, and the relieving officer desired to weigh such of them as the defendant would bring out for that purpose. Some of the loaves were accordingly taken into the premises and weighed, and being found deficient in weight, the guardians refused to receive any of the loaves, and they were replaced in the cart, and all taken back by the defendant: Held, that this was a sufficient delivery to satisfy the terms of the first issue.
- Held, secondly, that the latter breach was well assigned, and the issue thereon (being found for the plaintiffs) material: the guardians having by the contract the option of returning the bread, unless a bill of particulars

were sent *with* it, or of dispensing with that, and suing the defendant unless he sent a bill *within a month*.—*Elliott v. Martin*, 2 M. & W. 13.

11. (*Several pleas*.) In an action on a bill of exchange by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 W. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die. The Court struck out the last plea.—*Dawson v. M'Donald*, 2 M. & W. 26.
12. The plaintiff sued the defendant for the breach of an agreement to retake of him a public-house, (which the plaintiff had previously taken from the defendant), and to pay for the goodwill, stock, &c., provided C. & Co., the owners of the house, would accept the defendant as a tenant; and the declaration alleged that the defendant did not ask C. & Co. to accept him as their tenant, or make any effort to cause them to do so. This allegation the defendant denied by his plea, and issue was joined thereon. The plaintiff called the managing clerk of C. & Co., who proved that the defendant made application by letter for the house, in answer to which a personal interview was required; the defendant made no further application himself, but his brother-in-law made inquiries on his behalf, to which a similar answer was returned. The witness stated also that C. & Co. would not have let the house, except at an increased rent. On this evidence the plaintiff was nonsuited, and the Court held that the nonsuit was right.—*Jefferies v. Clure*, 2 M. & W. 43.
12. (*Several pleas*.) In an action on a banker's cheque, the Court refused leave to add a plea, (the time for pleading having expired,) that it was drawn by the defendant more than fifteen miles from the place where it was made payable, and falsely dated, in contravention of the 9 Geo. 4, c. 49, s. 15.—*M'Dowall v. Lyster*, 2 M. & W. 52.
14. (*Arrest of judgment—Want of allegation of promise to pay in assumpsit*.) Where separate damages are assessed on each count of the declaration, if one count is bad, the judgment will be arrested on that count only.
The want of an allegation of a promise to pay, in an indebitatus count, is not supplied, even after verdict, by a plea of non-assumpsit pleaded to the whole declaration; nor by the statement at the commencement of the declaration, that the defendant was summoned to answer in an action on promises, or the conclusion, that "in consideration of the premises respectively before-mentioned, the defendant promised to pay, &c.," such promise being confined in its terms to other counts.—*Hayter v. Moat*, 2 M. & W. 56.
15. (*Commencement and conclusion of declaration in the Exchequer*.) The declaration stated in the commencement of it that the plaintiff was a debtor to the king, &c., and concluded with the *quo minus* clause, as in the old form: Held, on special demurrer, that the declaration was sufficient, as this was surplusage only, and that the proper course was for the defendant to have obtained a summons to strike out the superfluous matter.—*Alderson v. Johnson*, 3 M. & W. 70.

16. (*When plea bad as not answering whole declaration.*) A declaration contained one count on a bill of exchange against the acceptor, and a second count on an account stated. The defendant pleaded that he did not accept the bill of exchange in the declaration mentioned, taking no notice of the count on the account stated: Held, that the plea was bad on special demurrer.—*Putney v. Swann*, 2 M. & W. 72.
17. (*Signing pleas.*) A plea of plene administravit does not require to be signed by counsel. (Tidd's Pr. 671).—*Reed v. Spurr*, 2 M. & W. 76.
18. (*Declaration on bill of exchange, form of.*) Action on a bill of exchange by the drawer against the acceptor. The declaration alleged that the bill was made on the 29th of March, payable four months after date, "which period has now elapsed:" Held, that the declaration was sufficient, and that it was not necessary to aver that four months had elapsed "before the commencement of the suit." (1 M. & W. 209).—*Owen v. Waters*, 2 M. & W. 91.
19. (*Express colour in trover.*) Trover for an oak tree, the property of the plaintiff. Plea, that the defendant was seised in fee of a close, and, being so seised, he, the defendant, cut down the tree, which he afterwards delivered to one Richard Roe, to be kept for the use of him the defendant; and that the said R. R. afterwards delivered it to the plaintiff, whereupon the defendant took it out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, which was the same conversion in the declaration mentioned: Held, on special demurrer, that the plea was good.—*Morant v. Sign*, 2 M. & W. 95.
20. (*Informal conclusion, how taken advantage of.*) An informal conclusion of a plea is no ground for arresting the judgment, or for a repleader, if there has been an issue to try; the objection can be taken advantage of only on special demurrer.—*Smith v. Smith*, 5 D. P. C. 84.
21. (*Commencement of plea.*) The Court will not set aside a plea because it commences with a formal defence.—*Bacon v. Ashton*, 5 D. P. C. 94.

And see BREACH OF PROMISE OF MARRIAGE; CARRIER, 2; LIBEL, 1; TROVER, 1.

POOR LAWS AMENDMENT ACT.

(*Order of maintenance of bastard.*) An application, under 4 & 5 W. 4, c. 76, s. 72, for an order for the maintenance of a bastard child, which had become chargeable sixteen days before the October sessions, was made to the Epiphany sessions, without good reason shown why the application had not been sooner made: Held, that the sessions had no jurisdiction to entertain it.—*Rex v. Heath*, 6 N. & M. 345.—But the application need not in all cases be made to the first sessions after the child becomes chargeable, but must be made to the first sessions at which it can be made with effect. And where the child became chargeable a fortnight before the October sessions, and the overseer went with the mother to those sessions to procure an order, but finding that it was necessary to procure corroborative evidence, forbore to apply till the Epiphany sessions, *Coleridge, J.*, held that

the application was in time.—*Rex v. Justices of Oxfordshire*, 6 N. & M. 351; 5 D. P. C. 116.

POOR RATE.

(*Mandamus to make rate.*) A mandamus must issue to compel one of the churchwardens and one of the overseers of a parish to concur in making a rate for the relief of the poor, where they refuse to consent unless the rate expressly stated that certain inclosures are not within a particular district of the parish. And such rule is absolute in the first instance.—*Rex v. Churchwardens, &c., of Edlaston*, 1 N. & P. 20.

And see TURNPIKE ACTS, 2.

POWER.

(*Execution and proof of power of appointment.*) A power of appointment to be executed by a will signed, sealed, and published, by the donee, in the presence of, and attested by, three witnesses, is well executed by a will to which the attestation is simply, "witness, A., B., and C.," it being stated in the body of the will that the testator publishes and declares it to be his will, and the instrument concluding thus—"In witness whereof I have to this my last will set my hand and seal"—a signature and seal appearing thereto. (11 Ves. 467; 1 C. & M. 175; 7 Taunt. 355; 2 Sim. & St. 37; 4 Taunt. 213; 17 Ves. 454; 6 Taunt. 402; 2 M. & S. 576; 3 M. & S. 572.) And such an instrument, when thirty years' old, proves itself.—*Doe d. Spilsbury v. Burdett*, 6 N. & M. 259; and see *Buller v. Burt*, ib. 281.

PRACTICE.

1. (*Time to plead.*) Where, after delivery of declaration on the 28th October, with notice to plead in four days, a summons was taken out for further time to plead, and the judge, by an order dated the 29th, ordered that the defendant should have four days' time to plead, pleading issuably and taking short notice of trial: Held, that judgment signed on the 3d of November was not irregular. (2 Scott, 840.)—*Lane v. Parsons*, 3 Bingh. N. C. 264.
2. (*Distringas.*) A distringas to compel appearance must be indorsed with the amount of the debt claimed; it is not usually issued unless there have been three unsuccessful attempts to serve the defendant with process, or it appears clearly that the process has come to his hands.—*Gale v. Winkes*, 3 Bingh. N. C. 294.
3. (*Rule to plead.*) A rule to plead ought not to be left at the office till after the defendant has been served with notice of declaration filed.—*Bennett v. Smith*, 3 Bingh. N. C. 305.
4. (*Entering satisfaction on the roll.*) A defendant in C. P. cannot enter satisfaction on the roll without producing a warrant of attorney from the plaintiff.—*Wood v. Hurd*, 3 Bingh. N. C. 65; 5 D. P. C. 188.
5. (*In error.*) A common joinder in error to a special assignment of errors need not be signed by counsel.

It is not a ground of error *coram vobis*, that the writs of *venire facias* and

- distingas juratores*, are returned with only one panel annexed successively to both writs.—*Archbold v. Smith*, 1 M. & W. 742; *S. C. nomine Grant v. Smith*, and *Green v. Smith*, 5 D. P. C. 107, 174.
6. (*Form of issue.*) Where an issue had been delivered in the usual form, as for a trial at Nisi Prius, and the plaintiff subsequently obtained a judge's order to have the cause tried before the sheriff; and this order, with notice of trial, having been served: Held, on motion to set aside the issue, that it was irregular, as it ought to have been made up in the form of an issue to be tried before the sheriff; and that, it having been delivered before the judge's order was obtained, the plaintiff ought to have taken out a summons to amend the issue.—*Ward v. Peel*, 1 M. & W. 743; 5 D. P. C. 169.
 7. (*Costs of passing record.*) By the practice of the Courts of King's Bench and Exchequer, a plaintiff has not a right to enter and pass his record immediately after issue joined and notice of trial given, so as to make the defendant pay the costs of it; but it is in the discretion of the Master to allow such costs or not, as he thinks fit.—*M'Kune v. Smith*, 2 M. & W. 85.
 8. (*Judgment as in case of nonsuit.*) Where issue was joined in vacation, but no notice of trial given (it not being shown that it was a country cause): Held, that it was too early to apply for judgment as in case of a nonsuit in the next term but one after issue joined.—*Heale v. Curtis*, 2 M. & W. 76.
 9. (*Judgment as in case of nonsuit.*) Where a plaintiff has given a peremptory undertaking to try at a particular assizes, his being prevented from doing so by the sudden illness of the judge, is not a sufficient excuse to prevent the defendant from obtaining judgment as in case of a nonsuit absolute. (2 D. P. C. 153.)—*Ward v. Turner*, 5 D. P. C. 22.
 10. (*Same.*) It is a sufficient answer to a motion for judgment as in case of a nonsuit, that the defendant has taken proceedings against the plaintiff in the Court of Chancery, and thereby rendered it needless to proceed to trial.—*Partridge v. Salter*, 5 D. P. C. 68.
 11. (*Same.*) It is a sufficient excuse for not proceeding to trial, that the defendant has, since the commencement of the action, taken the benefit of the Insolvent Debtors' Act; and the Court will in such case discharge a rule for judgment as in case of a nonsuit with costs, unless the defendant consents to a *stet processus*.—*Smith v. Badcock*, 5 D. P. C. 91.
 12. (*Service of rule.*) Service of a rule nisi to compute, by leaving it in the defendant's apartments, in which no person then was, though the defendant then resided there, held insufficient.—*Chaffers v. Glover*, 5 D. P. C. 81.
 13. (*Discharging defendant, on ground of illegal consideration.*) The Court will not discharge a defendant out of custody on the ground that the debt for which he has been arrested is founded on an illegal consideration, and an injunction has issued from the Court of Chancery to stay proceedings at law; if however the process of the Court has been abused for the purpose of oppression, the Court will interfere.—*Curzon v. Hodges*, 5 D. P. C. 98; *Mason v. Smith*, ib. 179.
 14. (*Notice to plead.*) In actions in which imparlance is abolished, the de-

- defendant is still entitled to notice to plead, before judgment can be signed for want of a plea. (2 B. & P. 363.)—*Fenton v. Anstice*, 5 D. P. C. 113.
15. (*Pleading issuably, what is.*) Where a defendant obtains time to plead on the terms of pleading issuably, he is not thereby precluded from demurring specially, for good cause, to the replication. (2 Str. 1186; 2 Bos. & P. 446; 5 D. & R. 620; 4 Bingh. 267.)—*Barker v. Gleadow*, 5 D. P. C. 134.
16. (*Entering appearance for defendant.*) Where a *capias* has been issued against one defendant, and he is discharged out of custody on account of a defect in the affidavit of debt, without the terms of entering an appearance being stated in the rule, and no appearance is entered by the defendant, the plaintiff has no right to enter one for him.—*Wilkins v. Parker*, 5 D. P. C. 150.
17. (*Demand of declaration.*) Only one demand of declaration is necessary; and therefore if the plaintiff obtains further time to declare, the defendant will be entitled to sign judgment of non pros. at the expiration of the last order for time.—*Teulon v. Gant*, 5 D. P. C. 153.
18. (*Distringas—Entering appearance for defendant.*) Where, after a rule has been obtained for a *distringas*, and before the issue of the writ, the defendant admits that he has been served with the summons, an appearance may be entered for him by the plaintiff.—*Saunders v. De Chastelain*, 5 D. P. C. 155.
19. (*Signing judgment on sci. fa.*) The Court will permit judgment to be signed on a *sci. fa.* after eight days from the return, where the defendant resides abroad, he having had reasonable notice of the proceeding. (1 Bingh. 378.)—*Weatherhead v. Landles*, 5 D. P. C. 189.
20. (*Attachment—Personal service.*) Where a copy of a rule nisi for an attachment was delivered to the defendant's son, who refused to say where his father was, and an appointment was then made for the following day; this was held not sufficient to dispense with personal service.—*In re Ib-bertson*, 5 D. P. C. 160.

PRESCRIPTION ACT.

1. On a general traverse of an allegation, under the 2 & 3 Will. 4, c. 71, of a right of way enjoyed as of right for 40 years, evidence is admissible of an agreement, within that period, to pay a sum of money for using the way. (1 C. M. & R. 211, 614.)

Seemle, that evidence of an annual payment for such permission, within the 40 years, would be admissible in support of an allegation of an interruption for a year, and acquiescence therein.

Seemle, that a special allegation of a deed or agreement is required; under s. 5, only where the deed or agreement preceded the forty or the twenty years; and that an agreement made within that period may be given in evidence under the general traverse, whether it were written or verbal.—

Tidde v. Brown, 6 N. & M. 230. [See *ante*, p. 74.]

2. A plea of enjoyment of right of common for thirty years before the commencement of the suit, held sufficient, without saying thirty years *next* before.—*Jones v. Price*, 3 Bing. N. C. 52.

PRISONER.

1. (*Discharge of small debtor.*) A prisoner in execution for damages under 20*l.* in an action for *crim. con.*, is entitled to his discharge after twelve months' imprisonment, under 48 Geo. 3, c. 123. (1 Ad. & Ell. 24.)—*Goodfellow v. Robings*, 3 Bing. N. C. 1.
2. (*Charging in execution for costs, by habeas corpus.*) A plaintiff in prison at the suit of a third person, may be charged in execution by the defendant, by *habeas corpus*, for the costs of a nonsuit, and the defendant is not driven to an action to recover them. The writ may issue without any affidavit; and need not name a day certain.—*Furnival v. Stringer*, 3 Bing. N. C. 96.
3. (*Detention of small debtor under Lords' Act.*) A prisoner entitled to his discharge, as having been in custody more than twelve months for a sum under 20*l.*, cannot be detained on the ground that he has been required to give in his schedule under the compulsory clause of the Lords' Act, and that sixty days have elapsed without his obeying the order.—*Davis v. Curtis*, 3 Bing. N. C. 259.
4. (*Habeas corpus.*) A prisoner in the Fleet being detained there in several actions, a warrant from Commissioners of bankrupt to the keeper of Newgate, authorising him to detain the party until he made answer to the satisfaction of the Commissioners, was delivered to the Warden of the Fleet: Held, that the prisoner was not in the custody of the Warden under the warrant, and therefore that the Court could not inquire into its validity.—*Ex parte Garcia*, 3 Bing. N. C. 299: and see *Ex parte Knight*, 2 M. & W. 106.
5. (*Charging in execution.—Writ of error.*) The notice of allowance of a writ of error precludes the plaintiff from charging a defendant in execution, though the defendant's affidavit does not state the grounds of error, or that bail has been duly put in.—*Marston v. Halls*, 2 M. & W. 60.
6. (*Defendant in ejectment within 48 Geo. 3, c. 123.*) A defendant remaining in execution twelve calendar months, for the nominal damages in ejectment, and the costs, is entitled to his discharge under the 48 Geo. 3, c. 123.—*Doe d. Threlfall v. Ward*, 2 M. & W. 65.

PROBATE.

- (*Policy of insurance, where bonu notabilia.*) Covenant on a policy of insurance under seal, whereby three of the directors of an insurance company did order, direct, and appoint, that if T. S., the insured, should die, &c., the capital, stock and funds of the company should stand charged and be liable to pay to the executors, administrators, and assigns of the said T. S., within three calendar months after his decease should be certified, the sum of 500*l.* The insured died in the diocese of Exeter, and the policy was in that diocese at the time of his death: Held, that a probate from the diocesan court of Exeter was sufficient to enable the executors to recover on the policy, though the defendants resided, and all the stock and funds of the company

were situate, in the diocese of London.—*Gurney v. Rawlins*, 2 M. & W. 87.

PROCESS.

1. (*Return of*.) Except for the purpose of saving the statute of limitations, or of proceeding to outlawry, a *capias* need not be returned previously to issuing an *alias*.—*Gregory v. Des Anges*, 3 Bing. N. C. 85.
2. (*Execution of by sheriff*.) The sheriff is bound, since the Uniformity of Process Act, to arrest a defendant as soon as he can after the delivery of the writ of *capias* to him; and has not the four months in which to execute it. *Quere*, whether he is liable to an action for negligence, in not arresting, when he has an opportunity, at the suit of the plaintiff, without proof of actual damage?—*Brown v. Jarvis*, 1 M. & W. 704.
3. (*Description of defendant in capias*.) A *capias* containing no other description of the defendant than his surname, is irregular. An actual or supposed place of residence must be stated.—*Margetson v. Tugghie*, 5 D. P. C. 9; *Ward v. Watts*, ib. 94.
4. There is no rule in the Court of Exchequer requiring the residence of the defendant to be stated in a writ of *ca. sa*.—*Strong v. Dickenson*, 1 Tyr. & G. 5; D. P. C. 99.

PROHIBITION. See ECCLESIASTICAL COURTS.

PROMISSORY NOTE.

1. (*Joint and several, how discharged*.) The holder of a joint and several promissory note of A. and B., by discharging A., discharges B. also.

The holder of two such notes, one of which only was due, received from A. a sum exceeding the amount of the note which was due, and exceeding A.'s moiety of the two sums for which he was liable on both notes; and gave up the note that was due, and erased A.'s name from the other note: Held, that thereby both A. and B. were discharged. (1 Bos. & P. 630; 6 Ves. 808.)—*Nicolson v. Revell*, 6 N. & M. 192.

2. An instrument in the following form:—"On demand, I promise to pay to A. B., or order, 120*l.*, with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from the devisees of W. T., as a collateral security for the same:" Held to be a promissory note assignable under the statute of Anne.

And the instrument being sued on as a promissory note, held, that it was sufficient if it was duly stamped as such, without bearing also a mortgage stamp.—*Wise v. Charlton*, 6 N. & M. 364.

3. (*Trover for stolen note*.) A promissory note delivered by the defendant to the plaintiff, payable to the plaintiff's order, was stolen from the plaintiff by his clerk, who, after forging the plaintiff's indorsement, obtained payment from the defendant's banker: the banker handed the note over to the defendant: Held, that the plaintiff was entitled to recover the amount from the defendant in an action of trover, although six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the note.—*Johnson v. Windle*, 3 Bing. N. C. 225.

And see STAMP, 3.

QUARE IMPEDIT.

A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of a party who had been shown to be a joint tenant with the plaintiff in a term of years in an advowson, alleged—"Whereupon and whereby the plaintiff became, and still is, possessed of the said advowson, as of an advowson in possession, for the remainder of the said term so heretofore granted." The defendant pleaded that he, as bishop of M., was seised of the advowson in right of his see; without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged: Held, that a fine of the advowson, levied in 1 Jac. 2, by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue. And, if received, it ought not to be left to a jury to say whether it barred the action of *quare impedit*.

A case touching the right of presentation to a living by the bishop of M., stated for the opinion of counsel by a bishop of M. in 1695, and found in the family mansion of descendants of that bishop, was held evidence against a subsequent bishop of the same see, on a question touching the right of presentation to the same living.

The statute of 10 H. 7, passed at Drogheda, avoided grants of advowson by Edw. 4, and, where they were appendant to a manor before the grant, reappended them.—*Bp. of Meath v. Marquess of Winchester* (in the House of Lords), 3 Bing. N. C. 183.

QUO WARRANTO.

The Court will grant leave to a private relator to exhibit an information in the nature of a quo warranto against individual members of a corporation, although the affidavits on which the rule is moved disclose matter tending to dissolve the corporation. (2 Burr. 869; 1 Bl. 187; 10 B. & C. 230.) —*Rex v. White*, 1 N. & P. 84.

And see OFFICE.

RECOVERY.

The Court will not amend the warrant of attorney in a recovery, even to the extent of transposing names placed in a wrong order.—*Lamont, vouchee*, 3 Bingh. N. C. 297.

REPLEVIN.

(*Liability of sheriff for taking insufficient sureties.*) Where parties tender themselves as obligors in a replevin bond, the sheriff ought to require evidence of their reputed credit and solvency, and not to rest satisfied with their own representation, even upon oath. But he is not bound to travel out of his office to obtain information. (5 Taunt. 225; 8 B. Moore, 27; 3 Stark. N. P. C. 168.)

In case against the sheriff for taking insufficient sureties to a replevin bond, the plaintiff cannot recover damages beyond the penalty in the bond.—*Jeffery v. Bastard*, 6 N. & M. 303.

RENT, APPORTIONMENT OF: See DISTRESS, 2.

SETTLEMENT.

1. (*By apprenticeship—Antedated indenture.*) A printed indenture of apprenticeship, which is antedated, is not therefore void under 8 Anne, c. 9, s. 35, although in the notice required to be given by the 5 G. 3, c. 46, s. 19, and which is in fact printed under the indenture, it is stated that in such case the indenture will be void.—*Rex v. Inhabitants of Harrington*, 6 N. & M. 165.
2. (*Imperfect contract of apprenticeship.*) A., a carpenter and occupier of land, was applied to by B., who wished to succeed C. as an apprentice to A. A. said he would take no more apprentices, unless they would work on the land as well as at the trade; but that he would take B. to do work as a servant. It was agreed that B. should live with A. three years to learn the business of a carpenter, and do any other work that should be required by A., who was to pay him certain weekly wages, and also for over work: Held, that the question whether this agreement constituted a contract of apprenticeship, or of hiring and service, ought to be decided by the sessions; but the sessions having, though they decided that it was a contract of hiring and service, granted a special case, the Court, on the facts found as above, reversed their decision, holding that the agreement was an imperfect contract of apprenticeship.—*Rex v. Inhabitants of Ightham*, 6 N. & M. 320.
3. (*Statement of ground of appeal in notice.*) The pauper's examination stated a settlement by hiring and service in Spalding; the ground of appeal stated by the appellants in their notice was, that the pauper had stipulated for two days' holiday at Spalding club feast: Held, that it was not open to them to prove a stipulation for one day's holiday at Holbeach fair.—*Rex v. Inhabitants of Holbeach*, 1 N. & P. 137.
 But it is a sufficient statement of the ground of appeal, to say that the party is settled in a particular parish, without specifying the species of settlement.—*Rex v. Justices of Cornwall*, ib. 144.
4. (*Copy of examination—Variance in proof of settlement.*) Where, in the copy of the examination sent by the respondent parish, pursuant to the 4 & 5 W. 4, c. 76, s. 79, the pauper stated that his father belonged to parish A., and that he, the pauper, had done no act to gain a settlement: Held, that the respondents might prove any species of settlement in parish A.—*Rex v. Inhabitants of Kelvedon*, 1 N. & P. 138.
5. (*Imperfect contract of apprenticeship.*) A. agreed on behalf of his son, that he should serve B. from the date of the agreement until a certain specified time, B. paying, at the expiration of the term, 5*l.* to the son; A. to find him clothes, washing, and all other necessities, and B. meat, drink, and lodging: Held, that this was a contract of hiring, not of apprenticeship.

The case stated that on the trial of the appeal, the respondents proposed to give in evidence conversations between the parties to the agreement before and at the time of signing it, but did not state what those conversations were; but it did distinctly state as a question for the opinion of the

Court, whether the agreement was a contract of hiring. The Court of King's Bench refused to send back the case to be restated.

A written contract of hiring is a question of law, on which the sessions may take the opinion of the Court of King's Bench.—*Rex v. Inhabitants of Billingham*, 1 N. & P. 149.

SEWERS.

An action against the clerk of the Commissioners of Sewers to recover damages for injury done to the plaintiff's house by the improper construction of a sewer along the adjoining street, was referred to arbitration. The arbitrator found that the commissioners had, by tunnelling, constructed a sewer fit and proper to be made, in a workmanlike, skilful, and proper manner in all respects; but that the probability of damage accruing would have been in some degree less if the sewer had been made by open cutting instead of tunnelling: Held, that the commissioners were not liable in the action. (6 Taunt. 29.)—*Grocers' Company v. Dunne*, 3 Bingh. N. C. 34.

SHERIFF.

1. (*Attachment against—Returning writ in vacation.*) Where a plaintiff rules the sheriff in vacation to return the writ, or bring in the body, with the view of proceeding against the sheriff in the next term, he will not be entitled against the sheriff to any damages which may accrue intermediately between the default and the attachment, unless he give the sheriff notice of his intention to proceed against him when the irregularity is first discovered.

The costs of such notice will be included in the costs of the attachment. —*Rex v. The Sheriff of Essex*, in *Fitch v. Courtenay*, 1 M. & W. 720.

2. (*When compellable to return writ.*) Where a writ of *ca. sa.* has been sued out, and the parties subsequently compromise the action, the Court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. (5 T. R. 470.)—*Hedges v. Jordan*, 5 Dowl. P. C. 6.

3. (*Attachment—Service of judge's order.*) In order to obtain an attachment against the sheriff for not returning a writ pursuant to a judge's order, the original order must be shown at the time of serving a copy of it. —*Granger v. Fry*, 5 D. P. C. 21.

4. (*Returning writ—Mandate to bailiffs of liberty.*) Where a *ca. sa.*, without a *non omittas* clause, has been directed to the sheriff, and he has issued his mandate to the bailiff of a liberty in which the defendant resides, and after obtaining time to return the writ, has returned *cepi corpus* in due time, the bailiff cannot be compelled to return the mandate, though he has also obtained time to return it.—*Jackson v. Taylor*, 5 D. P. C. 140.

And see INTERPLEADER ACT; MUNICIPAL CORPORATION ACT; REPLEVIN.

SHIPPING.

(*Lien of owner on cargo.*) The plaintiff, a shipowner, agreed by charter-party with G. to convey a cargo to Calcutta, and to deliver a return cargo

at the East India docks in London, for a freight of 14*l.* a ton on the ship's tonnage; the last payment thereof to be made by bills at four months, on the arrival of the ship in the Thames. G., by his agents, put on board goods at Calcutta, and consigned them to the defendants, who were aware of the existence of the charter-party. The plaintiff's captain signed a bill of lading, by which freight was expressed to have been paid by bills on London: Held, that notwithstanding the terms of the bill of lading, the plaintiff had, even as against the defendants, the consignees, a lien on the goods for the hire of the ship due under the charter-party. (*Saville v. Campion*, 2 B. & Ald. 503; 2 B. & B. 410; 2 Marsh. 339; 4 B. & Ald. 630.)—*Campion v. Colvin*, 3 Bingh. N. C. 17.

SLANDER OF TITLE.

The plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which the plaintiff had demurred: Held, that without alleging special damage, the plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted; and that persons duly authorized had arrived at the mine. (Sir W. Jones, 196; Cro. Jac. 484; Keb. 153; Style's Rep. 169, 176.)—*Malachy v. Soper*, 3 Bingh. N. C. 371.

STAMP.

1. (*On lease.*) A lease demised a house and land at a rent certain, and then demised two fields, from the succeeding Michaelmas, at the same rent which the lessor received from the persons who occupied them: Held, that it did not require, on account of the latter demise, a stamp of 1*l.* 15*s.*, but that it was sufficient if such an ad valorem stamp were affixed as would cover the whole amount of rent to be paid.—*Parry v. Deere*, 1 N. & P. 47.
2. (*On mortgage.*) On mortgage of a term for years determinable on lives, the sum of 130*l.* was advanced, with power for the mortgagee to pay 70*l.* for renewal, in case a life should drop: Held, that a 2*l.* stamp was sufficient, notwithstanding there was a covenant by the mortgagors to procure a renewal, without any limit of the sum to be paid by him for that purpose. (8 Bingh. 146; 4 B. & Ald. 204; 1 Man. & R. 130; 2 B. & Adol. 807.)—*Doe d. Jarman v. Larder*, 3 Bingh. N. C. 92.
3. (*Promissory note.*) An instrument in the following form, "11th October, 1831. I. O. U. 20*l.*, to be paid on the 22nd inst., W. B.," requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of 10*l.*—*Brooks v. Elkins*, 2 M. & W. 74.

And see PROMISSORY NOTE, 2.

STOCK JOBBING ACT.

Time bargains in foreign funds are not within the prohibition of the Stock-jobbing Act, 7 G. 2, c. 28, nor illegal at common law. (2 Bingh. N. C. 722, 732.)—*Elsworth v. Cole*, 2 M. & W. 31.

TRESPASS.

1. (*Pleadings—Distributive issue.*) On a plea of a right of way to fetch water and goods from a river, the jury found the right to fetch water, and negatived the right to fetch goods. The Court ordered judgment to be entered for the defendant as to the right to fetch water, and for the plaintiff as to the right to fetch goods. (1 M. & W. 216.)—*Knight v. Woore*, 3 Bingh. N. C. 3.
2. (*Costs.*) Trespass by husband and wife for assault, battery, and imprisonment of the wife. Pleas, first, not guilty; secondly, that the female plaintiff was not the wife of the other plaintiff. Verdict for plaintiff on both issues, with a farthing damages: Held, that a battery was not admitted on the record, so as to preclude the judge from certifying under the 43 Eliz. c. 6.—*Wilson v. Lainson*, 3 Bingh. N. C. 307.

TROVER.

1. (*Pleading—Conversion—Effect of not guilty.*) In trover, since the new rules, the plaintiff is entitled to a verdict on the plea of not guilty, if on the trial a conversion in fact be proved, although it appear from the evidence, that at the time of such conversion the plaintiff had parted with his property in the goods.

Where a party, to whose order goods were lying at a wharf, gave the wharfinger an order to deliver them to A., but afterwards, with A.'s concurrence, gave him a fresh order to deliver them to B., which he did: Held, in an action of trover by A., against the wharfinger, that the defendant might avail himself of such transfer to B., under a plea that the plaintiff was not possessed of the goods as in the declaration mentioned. (2 C., M. & R. 1.)—*Vernon v. Shipton*, 2 M. & W. 9.

2. (*Conversion—Jurisdiction of the Vice Admiralty Court.*) A vessel having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor and a hawser attached to the vessel; for the purpose of securing her. The smack then left her for the purpose of carrying away some of her stores, with the intention however of returning. The owner of another smack came to her afterwards, and finding no one in or near the vessel, and her deck under water, took away the anchor and hawser, and delivered them up to the deputy vice-admiral of Essex: Held, that the anchor and hawser were not parted with, or left and abandoned, within the meaning of the 1 & 2 G. 4, c. 75, s. 1, and that the deputy vice-admiral was not justified in detaining them until salvage was paid, or security given for its payment.

The deputy vice-admiral, who received the anchor and hawser, alleged to have been left at sea, from the finder, refused, on application by the real owner, to deliver them up until the salvage was paid, or security given for the payment of it: Held, that this was a conversion: but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion.—*Clark v. Chamberlain*, 2 M. & W. 78.

And see FIXTURES; PLEADING, 19.

TURNPIKE ACTS.

1. (*Compensation under—Certiorari.*) The certiorari with respect to proceedings under the 3 G. 4, c. 126, is not taken away by the 4 G. 4, c. 95.

Where a jury is impanelled under the General Turnpike Act, 3 G. 4, c. 126, to assess the value of land taken by the trustees, belonging to B., C., D., and E. respectively, they being separately interested as lessees, the jury must find, and the inquisition must specify, the sum to which each is respectively entitled.

Semble, the inquisition should set out the notice given to the parties of the intention to impanel a jury.

A defect in the inquisition cannot be remedied by any subsequent proceedings.—*Rex v. Trustees of Norwich and Watton Roads*, 1 N. & P. 32.

2. (*Poor rate on tolls.*) The 3 G. 4, c. 126, s. 51, which exempts all persons from assessments to the poor's rate in respect of tolls or toll-houses, applies to the trustees of the tolls of a road made under a local act, although they are beneficially interested in the receipt of the tolls, and although some of the provisions of the local act are inconsistent with the general act.—*Rex v. Trustees of the Great Dover Road*, 1 N. & P. 157.

VENDOR AND PURCHASERS.

- P. agreed verbally to grant R. a lease for sixty years. R. paid part of the consideration, but P. died before the contract was carried into effect. His executors then granted the lease, which recited that P.'s agreement had been treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of the executors thereafter mentioned. The executors having paid their own attorney his charges for drawing the lease: Held, that they were entitled to sue R. for money paid, in their own right. (2 Bingham 177; 10 Bingham 51; 8 T. R. 308; 4 Taunt. 189; 5 B. & Ald. 521; 2 Y. & J. 83; 4 N. & M. 770.)—*Grissell v. Robinson*, 3 Bingham N. C. 10.

VENUE. See INFORMATION.

VICE ADMIRALTY COURT. See TROVER, 2.

WARRANT OF ATTORNEY. See INSOLVENT, 2.

WITNESS.

1. (*Competency.*) In ejectment brought to determine a tenancy at rack-rent, a person interested in the reversion is not an incompetent witness for the plaintiff, until it is shown that he is interested in putting an end to the tenancy.—*Doe d. Higgs v. Cockell*, 6 N. & M. 185.
2. (*Same—Incompetency, how removed.*) Where a witness, being examined on the *votr dire*, admits a disqualification, but asserts that his competency has been restored, such assertion is not conclusive. (1 Esp. N. P. C. 160; 2 Stark. N. P. C. 433.)

The incompetency of a witness interested as a member of a corporation, is not removed by a release of such interest executed by him to the corporation. (2 Lev. 231, 236; 1 Ventr. 351; 3 Y. & J. 19.)

The incompetency of a witness interested in the event of the suit, can-

not be removed by the indorsement of his name on the record, under the 3 & 4 W. 4, c. 42, s. 26.—*Bailiff of Godmanchester v. Phillips*, 6 N. & M. 211.

3. (*Competency.*) Where a witness has a direct interest in obtaining a verdict for the party for whom he is called, he is incompetent, although he may have a greater *uncertain and contingent* interest the other way.

Therefore, where in an action against A., on the joint and several note of A. and B., B. was called as a witness for A., to prove the illegality of the note, it was held to be no answer to an objection to his competency, that before the commencement of the action he had paid a moiety of all that was due, with the exception of a year's interest, and that if A. obtained a verdict, he, B., might be sued for the whole amount remaining due on the note. (2 Bingham 133; 6 Bingham 181.)—*Slegg v. Phillips*, 6 N. & M. 360.

4. (*Commission for examination of.*) The affidavit in support of an application for a commission to examine a witness out of the jurisdiction of the Court, need only state the name of the witness, that he is a material witness, and that he is out of the jurisdiction.—*Norton v. Lord Melbourne*, 3 Bingham N. C. 67; 5 D. P. C. 181.

5. (*Competency.*) On A. and B. entering into partnership, A. borrowed a sum of money of C., for which he gave her his promissory note, payable six months after demand. A. and B. subsequently dissolved partnership, and C. gave A. notice to pay the note, and afterwards indorsed it to B., who continued the business. In an action by A. against B., on a covenant in the deed of dissolution for the payment of a sum of money to A., B. set off the note. C. being called as a witness for B., to prove the loan to A., the demand of payment, and the delivery of the note to B., stated on the *voir dire*, that she did not wish to take the money out of the business; that she considered the note to belong to B., but expected her principal and interest: Held, that she was a competent witness, for that B.'s liability on his engagement to her was wholly independent of the result of the action.—*Hatcher v. Seaton*, 2 M. & W. 47.

WRIT OF ERROR. See PRACTICE, 5.

WRIT OF INQUIRY.

- (*Good jury.*) Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the Court will direct the sheriff to summon a jury to be taken from the special jury book.—*Price v. Williams*, 5 D. P. C. 160.

WRIT OF TRIAL.

Semble, that the Court will not set aside a trial before the sheriff, on the ground that the case was not within the 3 & 4 W. 4, c. 42, s. 17, at the instance of the party who obtained the order for the writ of trial.

The first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to A., the defendant undertook that he was authorized by A. to purchase it on his behalf; that the plaintiff sent the pony to the defendant,

and was willing to sell it to A., but that the defendant had no authority from A. to purchase it. The second count was a similar one, but stating that the defendant himself undertook to purchase the pony. There was also an indebitatus count for a pony sold and delivered:—Held, that this was a record which might be sent by writ of trial before the sheriff, under the 3 & 4 W. 4, c. 42, s. 17.—*Price v. Morgan*, 2 M. & W. 53.

2. The Court held that an under-sheriff was justified in laying down a rule, that no person except a barrister or an attorney should act as an advocate before him on a writ of trial.—*Tribe v. Wingfield*, 2 M. & W. 128.

REGULA GENERALIS.

MICHAELMAS TERM, 3d Nov. 1836.

IT IS ORDERED, that from and after the last day of this term, all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight day rules instead of six day rules.

(Signed by all the Judges.)

EQUITY.

[Containing Mylne & Craig, Part 3; and 7 Simons, Part 1.]

ALIMONY.

It is doubtful whether a bill by the executors of a married woman, against her husband, to recover arrears of alimony due at her death, is sustainable. (See *Hoffey v. Hoffey*, 14 Ves. 261.)—*Stones v. Cooke*, Sim. 22.

APPEAL.

Upon a bill for discovery in aid of the defence to an action at law, an order having been made for the production of documents in the hands of the defendant, the execution of the order was stayed, pending an appeal to the House of Lords; upon the ground that not only would the execution of the order render the appeal useless, but also that the effect of suspending the order would be to delay the demand of the defendant himself, who was the plaintiff at law. Leave was given to the plaintiffs in equity to suggest any precaution as being necessary to prevent irreparable loss to them from the delay; as the death of witnesses or loss of documents.—*Storrey v. Lord George Lennox*, M. & C. 685.

BANKRUPT.

An order was made (without a reference), confirming a compromise between a bankrupt and his assignees, by which the bankrupt agreed to abandon all further litigation with respect to the validity of the commission, in consideration of a sum of money paid to him out of the estate, such compromise being approved by more than three-fourths in number and five-sixths in value of the creditors who had proved, and also by a considerable body of creditors who had not proved under the commission, and none of the creditors dissenting.—*In the matter of Chambers*, M. & C. 509.

BENEFICE.

The decision in this case, 6 Sim. 224, 15 L. M. 199, was affirmed on appeal.—*Metcalf v. Archbishop of York*, M. & C. 547.

BILL OF DISCOVERY.

1. A bill was filed by an assignee of alleged patents, to restrain the infringement of the patents, and for an account of the profits made by their use; the defendants insisted that the patents were originally invalid; or, if originally good, that they had been made void by subsequent acts of the patentee. On the hearing of the cause the bill was retained for three

years, with liberty for the plaintiff to bring an action; and the defendants were directed to admit that the plaintiff was the assignee of the patents, and that they had used the alleged inventions; and the plaintiff was ordered to produce certain deeds at the trial, and to admit their execution. The defendants then filed a bill of discovery against the plaintiff; but the discovery sought by that bill had reference only to the acts by which it was alleged that the patents had become void subsequently to their creation. The Court afterwards granted to the defendants permission to file another bill of discovery as to the original invalidity.—*Fec v. Guppy*, M. & C. 487.

2. A. having effected an insurance upon the life of B., brought an action against the office for the recovery of the amount insured. The office filed a bill of discovery in aid of their defence, charging that the declarations upon which the insurance had been effected were untrue, and that the defendant had in his possession various documents by which the truth of the matters alleged in the bill would appear. The defendant by his answer stated, that he had in his possession certain documents which he enumerated, but that from a certain period after the death of B. he considered it possible that the office might dispute their liability; and, therefore, from that period he contemplated the necessity of bringing the action; and that the documents contained information furnished to him as to evidence which could be procured or given on his behalf; that the producing the same might disclose the names of witnesses intended to be examined, and evidence intended to be given; and he submitted that he ought not to be compelled to produce any of the documents. He also admitted the possession of certain other documents, and added, that excepting the particulars mentioned, he had not in his possession any documents relating to the matters mentioned in the bill, whereby the truth thereof would appear: Held, that the admissions, coupled with the description of some of the documents, was sufficient to show that they were such as the plaintiff was entitled to inspect; that the statement of the possible effect of the discovery was not a sufficient ground for withholding it; that the defendant could not object to produce the documents acquired by him after litigation was contemplated, as that ground was not taken by the answer.—*Storey v. Lord George Lennor*, M. & C. 525.

CHARITY.

Queen Elizabeth, for the benefit of the free grammar school of Shrewsbury, granted to the bailiffs and burgesses, and their successors, the advowson of the vicarage of C.

By an act of parliament afterwards passed, all the estates belonging to the school were vested in a corporate body, called "The Governors and Trustees of the School," who were to hold the same in trust for the benefit of the school, except the right of presentation to those ecclesiastical benefices which were thereafter declared to be in the mayor, aldermen, and assistants. By a subsequent section, the mayor, aldermen, and assistants were directed to fill up vacancies in the vicarage of C., by nominating

a fit person; provided that such person should be preferred, *ceteris paribus* who should have been brought up in the school, and a graduate of one of the Universities, and born within the parish of C., except that it should be lawful to give such benefice to either of the Masters of the school, after he should have vacated his office of Master: Held, that the right of presentation to the vicarage of C. was vested in the mayor, aldermen, and assistants, as trustees, within the stat. 5 & 6 W. 4, c. 76, for the regulation of Municipal Corporations.—*In the matter of the Shrewsbury School*, M. & C. 632.

CREDITOR'S SUIT.

Where an executor paid interest on a legacy and died, and the legatee filed a bill for payment of the principal against the executor's representative; the legatee was afterwards allowed, on petition, to abandon his suit, and to prove for his legacy and for the costs of his suit and of the petition against the executor's estate, in a suit subsequently instituted by creditors of the executor.—*Turner v. Wardle*, Sim. 80.

DEMURRER.

(*Reference to documents.*) The Court, upon demurrer, must assume the statement in the bill, with respect to the purport of a deed, to be true; and the demurring party is not at liberty to read the instrument itself for the purpose of disproving the statement, notwithstanding that, for greater certainty as to its contents, the bill expressly refers to it as being in the demurring party's possession.—*Campbell v. Mackay*, M. & C. 603.

EVIDENCE.

A. made a voluntary settlement of lands in favour of C., and afterwards conveyed them to B., who was represented on the face of the conveyance to be a purchaser for a valuable consideration. B. filed a bill against C., to have the settlement set aside and his own title established, and in that suit examined a witness to prove the *bona fides* of the sale. D. subsequently filed a bill against B. and C., alleging that the sale was valid, but that the price was in part paid out of the monies which belonged to D., and claiming a lien to that extent upon the lands purchased. Finally, C. filed a bill against B. and D.; to set aside the sale *in toto*, on the ground of its being fraudulent and collusive, and to establish the voluntary settlement: Held, that in the last-mentioned suit, on an issue between D. and C. to try whether the purchase-money was *bona fide* paid, it was not competent to D. to read evidence taken in the suit between B. and C.—*Humphreys v. Pensam*, M. & C. 580.

INFANT.

1. Where a co-plaintiff, who was an infant when the suit was instituted, moved, on coming of age, that his name might be struck out of the bill, the motion was granted.—*Acres v. Little*, Sim. 138.
2. An infant was allowed to be placed at the University of Dublin, under special circumstances.—*Lethem v. Hall*, Sim. 141.
3. An order was made that an infant ward of Court might be at liberty to

go abroad for a short period to visit his father, on satisfactory security being given that he would be restored to the jurisdiction within a limited time.—*Biggs v. Terry*, M. & C. 675.

4. Where a messenger had been ordered to bring an infant defendant into Court, to have a guardian assigned for putting in her answer, and the messenger's return stated the infant was secreted by her mother, the senior Six Clerk, not towards the cause, was appointed guardian, without the infant being produced.—*Eyles v. Le Gros*, 9 Ves. 12.

INJUNCTION.

1. An injunction to restrain the owners of a railroad made over the plaintiff's land from using the railroad after it had been completed, or from interrupting the plaintiff's workmen in removing it, and restoring the land to its original state, although the possession of the land had been obtained from a tenant of the plaintiff by means of circumvention and fraud, was refused.—*Deere v. Guest*, M. & C. 516.
2. The statute 53 G. 3, c. 121, empowers the Commissioners of Woods and Forests to make certain new streets according to a particular plan therein referred to, and to lease, and to enter into agreements for leasing, the ground in the lines of the new streets. Under this, leases were granted of two plots of ground, upon which the lessees erected houses in the line of one of the new streets. Each of the leases described the plot of ground which it demised as being "on the north side of a new street then forming there, called," &c., and as "fronting towards the south on the said new street." The plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses; but that plan was not mentioned in either of the leases.

The streets were made, the space in front of the houses being left open. By the permission of the Commissioners of Woods and Forests, and the paving committee of the parish, a statue was about to be erected in the open space, which did not interfere with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that, upon the treaty for the leases, the lessees were shewn the plan of the intended new street, and parts adjacent, by which it appeared that the space in question was to be quite free and open from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged, that the proposed erection would diminish the value of their property, and be a public and a private nuisance: Held, that the lessees were not entitled to an injunction to restrain the erection of the statue.—*Squire v. Campbell*, M. & C. 459.

3. A. acting on behalf of the subscribers to a railway then before parliament, entered into an agreement with the trustees of a road, whereby it was stipulated, that in consideration of the trustees withdrawing their opposition in parliament, and consenting to forego certain clauses, of which they had intended to press for the insertion in the act, a formal instrument,

to the effect of the clauses, should be executed under the seal of the company when incorporated; and the bill was accordingly allowed to pass unopposed and without the clauses. An injunction was granted at the suit of the trustees, to prevent the company from violating the provisions contained in the omitted clauses.—*Edwards v. The Grand Junction Railway, M. & C. 650.*

INSOLVENT.

A bill by an insolvent to set aside an assignment by his assignee of his interest under his father's will, stating a special case of collusion between the assignees and the executors, is not demurrable. (See *Saxton v. Davis, 18 Ves. 72.*)—*Barton v. Joyne, Sim. 24.*

LACHES.

A. having a claim on property which he knew to be the subject of a reference between C. and D., suffered the award to be made without bringing forward his claim: Held, that he was bound by the award. (*Mocatta v. Murgatroyd, 1 P. W. 393.*)—*Govet v. Richmond, Sim. 1.*

LEASE.

An equitable depositary of a lease for securing a debt is liable to the rent and covenants, although he has not taken possession of the premises. (*Lucas v. Comerford, 1 Ves. jun. 235.*)—*Flight v. Bently, Sim. 149.*

LIEN.

1. A., a merchant in Liverpool, being indebted to B., a merchant in London, on the 11th April sent, at B.'s request, a written order to C., his agent in Bahia, to deliver to B.'s agent there all the goods belonging to A. in his C.'s hands. On the 23rd May A. committed an act of bankruptcy, on which a commission issued. On account of the distance of Bahia from England, the order did not reach C. till after the 23rd May: Held, that A. had a lien on the goods for his debt.—*Burn v. Carvalho, Sim. 109.*
2. I., tenant in tail and in fee, covenanted on his daughter's marriage with two trustees, one of whom was his son, to pay an annuity to his daughter out of the rents and income of his real and personal estates, and, by deed or will, to settle an estate of 200*l.* a year; or, at his own election, 4000*l.* in lieu of it, on certain trusts, for the benefit of his daughter and her husband, and their issue. By a subsequent deed, I. and his son, no other person being a party, agreed to suffer a recovery of the entailed estates and to sell them, and also the fee-simple estates, and that, out of the proceeds, I.'s debts (for some of which his son was surety), should be paid, and that certain sums should be taken by I. and his son for their own use, and that 4000*l.* should be paid, and provision made for the annuity. A recovery was accordingly suffered, and the estates were limited to I. and his son in fee. They afterwards agreed to abandon the last-mentioned agreement, and, in consideration of his son's covenanting to pay I.'s debts, the estates were conveyed by them to his son in fee. The son afterwards mortgaged the estates comprised in the recovery: Held, that the covenant for the payment of the annuity created a prior charge on the estates; that

the covenant to settle the estate, or an annuity of 4000*l.* in lieu of it, created no charge or lien on any of I.'s estates; and that the subsequent agreement being merely voluntary, could be properly abandoned by them. (*Walwyn v. Coutts*, 3 Mer. 707.)— *Ravenshaw v. Hollier*, Sim. 3.

LONDON DOCK ACT.

The London Dock Company are empowered by Act of Parliament to purchase lands for the purposes of the act, and, in certain cases, the purchase-monies are to be re-invested in the purchase of other lands, and the expenses of the re-investment paid by the company. By the same act, the Lords of the Treasury are empowered to purchase certain quays within a given time; but no express directions are given as to the re-investment of the purchase-monies, or as to the payment of the expenses. By a subsequent act, not relating to the Dock Company, the time given to the Lords of the Treasury for purchasing the quays is extended; and it is enacted, that all the powers, provisions, regulations, directions, clauses, matters and things in the former act shall extend to the latter: Held, that the clauses in the former act relating to the re-investing of the purchase-monies, and payment of the expenses, are applicable, *mutuis mutandis*, to the latter act.—*In the matter of the Lords of the Treasury*, Sim. 134, M. & C. 676.

LUNACY.

1. The allowance made out of a lunatic's estate for the maintenance of himself and daughters was increased, in consideration of the intended marriage of one of the daughters, and a portion of the allowance was appropriated to the joint establishment of her and her husband, and was directed to be settled to her separate use; and a sum of money approved by the master was also ordered to be paid to her out of her father's estate by way of outfit. (*In re Freak*, 14th Aug. 1830.) *In the matter of Drummond*, M. & C. 627.
2. In determining whether a commission should issue, the Court looks only to the protection of the person and property of the party, and not to the possible result of the commission upon the validity of his antecedent acts, or to the motives which have actuated the proceeding.—*In the matter of J. W.*, M. & C. 538.

PLEADING.

1. (*Demurrer—Bill of discovery.*) The word "order," without the word "decree," in the prayer of process to a bill of discovery, does not render the bill demurrable; the word being considered as meaning such an order as is consistent with the general scope of the case made by the bill.—*Baker v. Braham*, Sim. 17.
2. (*Multifariousness.*) J. C., by his marriage settlement, vested a fund in A. and B. upon trust for his wife for life, and after her decease for the children of the marriage; with a proviso, that the persons to be appointed guardians of the children by his will, with the trustees, should, after the death of the wife, have authority to apply the interest, and also, in certain cases, part of the capital of the children's presumptive shares, towards

their maintenance and advancement during minority. By a second deed, made after marriage, J. C. vested another fund in C. and D., in trust for his wife for life, and after her decease for the benefit of the children of the marriage, with a proviso that the trustees, with the guardians to be appointed, should, after the decease of the wife, have the like power, during the minority of the children, to apply the interest of their presumptive shares towards their maintenance and education. By his will, after making some specific bequests to his wife, he bequeathed his property to A., B. and C., upon certain trusts for the benefit of his children, and he appointed them his executors and guardians of his infant children, in conjunction with their mother.

A demurrer to a bill filed, after the husband's death, by the wife and the infant children, against A., B., C., and D., for an account of the property comprised in the trusts of the two deeds and the will, on the ground of multifariousness, was overruled.—*Campbell v. Mackay*, M. & C. 603.

3. (*Parties.*) A. bequeathed a reversionary interest expectant on his wife's death, in a sum of stock to B., who bequeathed it to C., who bequeathed it to D.; and he, on the death of A.'s wife, filed a bill against the trustees to have the stock transferred to him, alleging that the executors of A. and B. and C. had successively assented to the bequests: Held, that the assent of the executors must, for the purposes of the demurrer, be considered as tantamount to proof of the fact at the hearing, and the demurrer be overruled, the executors not being, in that case, necessary parties. *Smith v. Brooksbank*, Sim. 18.
4. (*Same.*) On a bill filed by a partner in a mining concern, stating that the defendants, the legal owners of the mine, and copartners in the concern, had, unknown to the plaintiff, but with the consent of the other copartners, to whom they had accounted, sold the mine to trustees for a joint stock company, the property of which was held by numerous proprietors, in shares passing by delivery of the certificates, and had received the consideration for the sale, partly in money, and partly in shares in the joint stock company, and praying that the defendants might, at the plaintiff's election, either account to the plaintiff for his proportion of the profits derived from the sale, or out of the shares in the joint stock company in their hands, might transfer to him such a number of shares as would be equivalent to the interest which the plaintiff had in the original adventure: Held, that a demurrer, on the ground that the other partners in the concern, or the trustees or shareholders in the joint stock company, were not parties, was bad.—*Mare v. Malachy*, M. & C. 559.
5. (*Same.*) Some of the next of kin of I. F., an intestate, filed a bill against the other next of kin, the administrator, and the parties claiming to be heirs at law, stating that I. F. had entered into contracts for the sale of certain of his real estates, which were at the time of his death, and still were, incomplete; and that the administrator, and another of the next of kin, who claimed to be his coheirs at law, had agreed that the proceeds of the estates, whether the contracts were completed or not, should be divisible as personalty; and alleging that the administrator had ever since

been in the possession of such estates, and had received the rents; and praying an account of those receipts, and that the amount might be invested and secured for the benefit of the persons entitled. A demurrer by the administrator, on the ground that the purchasers of the estates were not parties to the bill, was allowed.—*Lumsden v. Fraser*, M. & C. 589.

6. (*Purchaser—Answer.*) A purchaser for valuable consideration, who submits to answer, must answer fully. (*Ovey v. Leighton*, 2 Sim. & St. 234.)—*Lord Portarlington v. Soulby*, Sim. 28.

POWER OF SALE.

A reversion in fee, expectant on a life estate, was settled in strict settlement, and the trustees were empowered at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee in possession. The tenant for life in possession, together with the tenant for life under the settlement, and the trustees, by their agent, sold the estate for one entire sum. The purchasers objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections: Held, that the power was well exercised; and the purchaser having waived all other objections, could not insist on the objection that the money must be apportioned.—*Clarke v. Seymour*, Sim. 67.

PRACTICE.

1. An order made at the hearing of the cause, and giving the plaintiffs leave to amend, for the purpose of adding parties or showing why they were unable to bring all proper parties before the Court, was held to have been sufficiently complied with by an amendment stating that the plaintiffs sued on behalf of themselves and all persons (other than the defendants), who filled a particular character, and alleging that the persons filling that character were so numerous that if they were individually made parties, the suit could not be effectually prosecuted.—*Milligan v. Mitchell*, M. & C. 511.
2. (*Commission to examine witnesses abroad.*) A commission to examine witnesses awarded to the judges of the supreme courts in India, under the statute 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length.—*Murray v. Lauford*, Sim. 139.
3. (*Commitment.*) A motion to commit cannot be made except on a seal day.—*Sarby v. Sarby*, Sim. 140.
4. (*Costs of accountant.*) In taking the accounts of an intestate's estate, the plaintiffs, in consequence of the evasive and fraudulent conduct of the administratrix, had been under the necessity of employing an accountant. Before the hearing on further directions, the administratrix was ordered to pay the costs of employing the accountant.—*Tower v. Thompson*, Sim. 145.
5. (*Costs.*) A plaintiff who had misdescribed his residence, was ordered to give security for costs. (S. C. 2 M. & K. 417.)—*Sandys v. Long*, Sim. 140.

6. (*Exceptions.*) A defendant took one general exception to a report finding his examination insufficient: the Court held the report to be right in part and wrong in part; and overruled the exception and gave the plaintiff the deposit, but, under the 41st order of 1831, refused to make any order as to costs.—*Ward v. Fitzhugh*, Sim. 42.
7. (*Production.*) If a plaintiff has proved a document in a defendant's possession, the latter must produce it at the hearing, although he has not been served with an order to that effect.—*Wheat v. Graham*, Sim. 61.
8. (*Pro confesso.*) The order for taking a bill *pro confesso*, operates from the time when it is pronounced; and the Court will not discharge the order, although the answer is filed before the rising of the Court on the day on which the order is made.—*James v. Cresswicke*, Sim. 143.
9. (*Same.*) A motion, by a defendant, against whom the bill had been ordered to be taken *pro confesso*, that the order might be discharged, and he be at liberty to put in his answer, was refused; although the defendant did not mean to enter into evidence, and the case against him being the same as against the other defendants, he consented to the evidence which had been taken being read against him.—*Carr v. Paulett*, 142.
10. (*Purchaser.*) Where a purchaser under a decree agreed to sell to A. and died, his heir being abroad; it was ordered that A. should be substituted as the purchaser, and should be at liberty to pay the purchase money into Court and be let into possession. (*The King v. Gregory*, 4 Price, 380.)—*Pearce v. Pearce*, Sim. 139.)
11. (*Rehearing.*) Where a decision of the Court below, upon a question of law, has been affirmed on appeal, it is not sufficient to allege, in support of an application for a rehearing, that the decision was erroneous, and that the question was new.—*Att. Gen. v. Ward*, M. & C. 449.
12. (*Supplemental Answer.*) Where the plaintiff claimed a share in an intestate's estate, under the Statute of Distributions, and the defendant, after filing his answer, discovered that the intestate was domiciled in Java: Leave given to file a supplemental answer for the purpose of stating that fact.—*Tidswell v. Bowyer*, Sim. 64.

REVERSION.

The assignee of a reversion is not entitled under the statute 32 H. 8, c. 34, to arrears of rent which became due prior to the assignment.—*Flight v. Bentley*, Sim. 149.

RAILWAY SHARES.

J. H. subscribed for twenty shares of 100*l.* each, in a projected railroad, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, and devised certain of his real estates to a trustee, in trust to sell and pay all debts due from him on mortgage or for the purchase of estates which he had contracted for, and all other just debts that should be due from him at his death. When he died the shares were at a premium, and no further instalment on them had been called for. Two years afterwards, the act for making the

railroad passed: Held, that J. H.'s personal estate being exonerated, his widow was entitled to have the past as well as future calls paid out of the real estate, such calls constituting a debt due from the testator.—*Blount v. Hipkins*, Sim. 51.

REPRESENTATION.

A testator died in India. One of his executors proved his will in India, and died, and his executor proved his will in England: Held, that the last executor was not the personal representative of the first testator.—*Twyford v. Trail*, Sim. 92.

SPECIALTY DEBT.

J. B. by will gave his personal estate to J. R., B. W., and G. B., his executors, in trust to invest two sums of 600*l.* in their names, for his daughters for life, and, after their deaths, for their children. J. R. and B. W. alone acted. J. R. paid the interest of the two sums to the daughters, but did not invest the principal. B. W. executed a mortgage to J. R. and G. B., for securing 1300*l.*, part of the testator's estate possessed by him, and died. His executors paid off the 1300*l.*, and J. R. and G. B. joined in assigning the mortgage to them, and in signing a receipt for the money. J. R. died, having executed a deed-poll, reciting that J. B. gave all his personal estate to J. R., B. W., and G. B., upon certain trusts mentioned in his will, and acknowledging that J. R. had received the whole 1300*l.*, and that G. B. joined in the assignment and receipt for conformity only: Held, that under the deed-poll the cestui que trusts of the two sums of 600*l.* were specialty creditors of J. R. (See *Harvey v. Harvey*, 6 Madd. 91.)—*Turner v. Wardle*, Sim. 80.

TRUST.

1. J. W., by his will, directed his trustees, at the expiration of three years after his death, to pay 10,000*l.* (which he charged on an estate devised to his son, one of the trustees,) to his daughter's husband, on condition that he should, to the satisfaction of the trustees, give to them the best and most sufficient security in his power, so that the 10,000*l.* might be effectually secured to them upon certain trusts for the testator's daughter and her children. The son paid the money to the husband before the expiration of the three years, and the trustees took a bond for securing it: Held, that the trustees were justified in anticipating the time of payment, but not in taking the bond.—*Mills v. Osborne*, Sim. 30.
2. J. S., a partner in a house of agency in India, died, having by his will directed his estate to be called in and invested on certain trusts, and appointed two of his copartners his executors. They, however, suffered his share in the partnership to remain in the house. After J. S.'s death, A. and B. were admitted as partners, and they knew that J. S.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed: Held, that A. and B. were not responsible for the breach of trust committed by their copartners, the executors.—*Twyford v. Trail*, Sim. 92.

VENDOR AND PURCHASER.

In 1828, A., a trader, conveyed his estates, and certain monies due to him, which were, substantially, the whole of his property, to trustees in trust to sell, and pay his creditors. In 1830 the trustees sold part of the estates to B., and A. joined with the trustees in the conveyance to B. In 1833 B. sold the purchased premises to D., who objected to the title, on the ground that the conveyance of 1828 was an act of bankruptcy. No commission had, however, issued against A.: Held, that the conveyance to B. was protected by the 38th section of the Bankrupt Act.—*Earl Granville v. Danvers*, Sim. 121.

WILL.

1. (*Construction.*) J. O., by his will, gave a real estate and a sum of stock to A. for her life, and, after her death, to his brother absolutely; and he gave legacies, which he directed to be paid as soon as convenient after his death, to his nephews and nieces, and the residue of his property to his brother absolutely. The brother having died, the testator, by a codicil reciting that fact, and that, thereby, the devises and bequests to his brother had lapsed, gave an annuity to his brother's widow, and directed his trustees to pay the income of the residue of his personal estate to A. for life, and gave to her all his real estates for life, and, after her death, to his trustees in trust to sell, and the proceeds to fall into his personal estate. He then gave 10,000*l.* to each of his nieces, in addition to the legacies given to them by the will, and directed that sum for each of them should be held by his trustees for their separate use: and he gave all the clear residue of his estate (after providing for the before-mentioned legacies and also those given by his will) to his nephews: Held, that the legacies given by the codicil to the nieces were not payable till after A.'s death.—*Overend v. Gurney*, Sim. 128.
2. (*Same.*) J. P., by his will, placed the son and daughter of his deceased son under the protection and trust of his trustees, and provided certain annual sums for their maintenance, until they attained twenty-four, when each of them was to receive a legacy of 1500*l.*; but if their mother should fix with her children out of England, their allowances were to be reduced: and if the son did not remain in England under the protection of the trustees, he was to forfeit his legacy. The mother took her children to India during their infancy, but returned to England four years afterwards. The son having obtained a commission in the army, shortly after his return joined his regiment in India. Afterwards, and whilst he was still under twenty-one, he returned to England on account of illness, and remained there about three years, and then having attained twenty-one, he rejoined his regiment in India: Held, that the expressions in the will were inapplicable to the events which had happened, and that the son did not incur a forfeiture of the legacy, or a reduction of his annuity.—*Schnell v. Tyrell*, Sim. 86.
3. (*Same.*) J. W. devised his real estates to the children of his sister, then or thereafter to be born, who should live to attain twenty-one, and the

issue of such of them as should die under that age leaving issue at their decease, and their heirs: and if no child of his sister should attain twenty-one, or dying without leaving issue, or dying under the age aforesaid, then over. The testator's sister had one child, who attained twenty-one, and afterwards died without issue: Held, that the child took an absolute estate in fee on attaining twenty-one.—*Lunn v. Osborn*, Sim. 56.

4. (*Same.*) M. B. bequeathed as follows: "I give the legacy of 4000*l.* to A., and in case of his decease, I give the same legacy to his wife, and at her decease to their eldest daughter:" Held, that A. having survived M. B., was absolutely entitled to the legacy.—*Crigan v. Baines*, Sim. 40.
5. (*Same.*) A testator gave to his son a legacy of 3000*l.*, and by a codicil, a legacy of 4000*l.*, in addition to the legacy of 2000*l.* given by his will: Held, that the son was entitled to 4000*l.*, the legacy given by the codicil, and also to the legacy of 3000*l.* given by the will.—*Gordon v. Hoffman*, Sim. 29.
6. (*Exoneration.*) J. H. gave to his wife certain articles of his personal estate, which he mentioned specifically, and also certain portions of his real estates free from the mortgages thereon, and the benefit of certain contracts which he had entered into for the purchase of other real estates. And he devised the rest of his real estates to A. B., in trust to sell, and out of the proceeds to pay, in the first place, his funeral and testamentary expenses, his debts due on the mortgages of the estates devised to his wife, the sums due on the contracts, and all his other debts; and, in the next place, he directed certain sums to be paid out of the proceeds to different persons, and he gave the residue to C. D., and appointed his wife sole executrix: Held, that the personal estate was exonerated.—*Blount v. Hipkins*, Sim. 43.

WITNESS.

1. The evidence of an interested witness may be read in a suit in equity under the stat. 3 & 4 W. 42, c. 4, ss. 26, 27.—*Wheat v. Graham*, Sim. 62.
2. The depositions of such of the witnesses in a cause as had died, were ordered to be read at the trial of an issue in the cause. The plaintiff afterwards died, having appointed A., one of his witnesses, his executor. A. revived the suit, and his name was substituted for the plaintiffs in the issue. Ordered that A.'s depositions should be read at the trial.—*Andrews v. Lady Beauchamp*, Sim. 65.

BANKRUPTCY.

[Containing 2 Montague & Aytton, Part 4, omitting all Cases which have appeared in former Digests.]

ADJUDICATION.

1. On a petition to reverse the adjudication, a reference was made to the commissioner to put a new deposition as to the petitioning creditor's debt on the proceedings.—*Exp. Gartley*, 524.
2. On a petition to reverse the adjudication and annul the fiat, the proceedings are not evidence against the bankrupt, unless notice of intent to use them is given, and copies are allowed.—*Exp. Goodwin*, 532.
3. On a petition to reverse the adjudication, the bankrupt will not be allowed to inspect the proceedings, where he has filed no affidavit in support of his petition.—*Exp. Whalley*, 722.

ALLOWANCE TO WIFE.

The Court can order the wife an allowance out of real estates, and itself decide the amount; the whole income is never given.—*Exp. Thompson*, 505.

ANNUITY.

An annuity payable while a person continues to superintend salt-works, which may be discontinued by the brine not flowing, or by the lease of the brine pits becoming forfeited, is capable of valuation.—*Exp. Parratt*, 626.

ANNULLING.

A fiat will not be annulled on an *ex parte* application by the petitioning creditor merely stating that he has been informed and believes the bankrupt to be a married woman.—*Exp. Harland*, 723.

APPEAL.

The Lord Chancellor will not hear an appeal from the Court of Review, on petition, instead of special case, merely because questions of law and fact are blended.—*In the Matter of Maberley*.—*Exp. Britten*.—*In the Matter of Butterworth*, 687, 688.

ASSIGNEES.

Assignees should not join with a creditor having an interest adverse to the fiat, in a petition to annul.—*Exp. Wilks*, 667.

BANKRUPT'S ALLOWANCE.

After a final dividend meeting, under the stat. 6 Geo. 4, c. 16, s. 109, the bankrupt is entitled to his per centage or allowance, notwithstanding he

may owe money to the assignees, or they may claim a debt from him.—*Exp. Cooper*, 689.

BILL OF EXCHANGE.

An offer of composition by the acceptor, not acceded to, with a declaration, in the presence of the drawer and holder, that he (acceptor) had not provided and should not provide for them, does not dispense with the necessity of presentment and notice of dishonor.—*Exp. Bignold*, 633.

BOND.

1. A bond to pay all sums a trader may owe a banker, does not cover balances, part of the items of which consist of sums paid by the banker's agent on drafts, illegal within the statute 55 Geo. 3, c. 184, s. 13.—*Swan v. Bank of Scotland*, 656.
2. The Court can rectify a clear mistake in the condition of a bond, to enable a proof to be made.—*Exp. White*, 541.

CERTIFICATE.

A bankrupt's certificate allowed after a petition presented to annul the fiat, is no bar to the petition.—*Exp. Hurvey*, 597.

CHECKS.

1. A person having credit with a bank, received money from the agent of the bank, and every week gave him an unstamped check on the bank for the amount advanced during the week, which the agent sent to the bank as a voucher for himself; this check was drawn more than ten miles from the bank, and post dated: Held not to be within the statute 55 G. 3, c. 184, s. 13.—*Exp. Bignold*, 633.
2. Where a person issued checks more than ten miles from the bank where they were made payable, it was held that to render the bankers liable under the stat. 55 G. 3, c. 184, s. 13, it must be shown that they paid the checks knowing them to have been so issued.—*S. C.*
3. Letters or orders for money sent by the hands of the servants of a person having credit with a bank more than ten miles from the customer's residence, and on which money is paid, are not "drafts or orders" for payment of money within the stat. 55 G. 3, c. 184, s. 13.—*Swan v. Bank of Scotland*, 660.

COMMISSIONER.

1. *Query* whether the Court can order a commissioner to pay the costs of a new meeting, necessary by his default in not attending.—*In the Matter of Wall*, 677.
2. The *quorum* commissioners named in a fiat are entitled to be summoned. If not, the Court will interfere, and can declare every thing void done under the fiat in their absence.—*Exp. Williams*, 616.

COSTS.

Costs were ordered to be paid by the bankrupt of a reference taken by him upon his petition to annul.—*Exp. Neirinkes*, 542.

EVIDENCE.

On a petition to annul, the depositions on the proceedings cannot be read in evidence, though notice to read them has been given, unless copies were tendered. (*Exp. Chambers*, 2 M. & A. 461.)—*Exp. Thurkill*, 672.

EXAMINATION.

On a petition to prove, examinations before Commissioners, taken in the absence of the party to be affected, cannot be read as evidence, unless notice to read them has been given.—*Exp. Bignold*, 641.

FIAT.

A fiat cannot be annulled, with consent of creditors, where the bankrupt has not surrendered.—*Exp. Levi*, 685.

FRAUDULENT PROOF.

Where A. combines with B., and A. with C., and A. with D., to prove fictitious debts, in pursuance of a fraudulent plan, a petition will not lie praying that A., B., C. and D. may pay the gross amount of costs incurred by the estate, and consequential to such fraudulent plan.—*Exp. Brand*, 708.

IMPERTINENCE.

When affidavits alleged to be impertinent are not read, the Court refers it to the officer to disallow, in taxation, the costs of all affidavits which in his opinion are impertinent.—*Exp. Harvey*, 593.

IMPOUNDING.

1. After a composition of less than 15s. in the pound, a commission issued in 1826: the bankrupt was then allowed to trade and contract new debts: in 1835 a fiat issued against him: Held, that the commission could not be impounded in order that the property might be distributed under the fiat.—*Exp. Abbott*, 599.

2. Where a separate fiat issued, under which the certificate lay for confirmation, and a joint fiat subsequently issued; the separate fiat was impounded to give effect to the subsequent joint fiat, and the proofs, &c., under the separate fiat, transferred to the joint fiat.—*Exp. Digby*, 785.

INJUNCTION.

1. If a party proves a debt on a bill, and proceeds at law for the same debt, the Court will issue an injunction to restrain the action.—*Exp. Diack*, 675.

2. Where a docket is struck improperly for a town fiat, a party applying for a country fiat is not entitled to an *ex parte* injunction to stay the issuing of the town fiat.—*In the matter of Ings*, 671.

INTEREST.

When the amount of a dividend is set apart under the statute 1 & 2 Will. 4, c. 56, sec. 31, and invested, and the proof is subsequently allowed, the creditor is not entitled to interest.—*Exp. Lewis*, 670.

ISSUE.

Where an order for an issue from Chancery directs all witnesses to be examined, but the plaintiff declines to call some, conceiving his case made

out, it seems the Judge will himself call the others.—*Groom v. Chambers*, 742.

LEASE.

An agreement by A. to procure from C. a lease for B., is within the statute 6 Geo. 4, c. 16, section 75 or 76.—*Exp. Benecke* 692.

LIEN.

Where real property is devised to trustees on trust for sale, and to pay the produce to the children of the testator, and the children sell the property to one of the executors in consideration of a sum secured by bills payable by instalments, and as to some shares further secured by an assignment of a policy of insurance, and the executor becomes bankrupt, without having paid the bills: The children have a lien on the estate for the sums unpaid.—*Exp. Latey*, 609.

OPENING BIDDINGS.

The biddings were ordered to be opened on a sale of mortgaged premises, on an advance of £190 on £310 — *Exp. Hutchinson*, 947.

PRACTICE.

A notice of motion to vary minutes does not prevent their being drawn up.—*Exp. Bell*, 578.

PROOF.

1. A proof of debt cannot be rejected by a commissioner merely because there are no entries in the books of the party seeking to prove.—*Exp. Beasley*, 632.
2. A creditor, whose debt is inserted in the debtor's schedule on his passing the Insolvent Debtors' Court, may prove that debt under a subsequent fiat against the debtor.—*Exp. Fenwick*, 681.
3. Where A. collected subscriptions from the members of a club to run greyhounds, on account of the treasurer, and became bankrupt, the treasurer was admitted to prove.—*Exp. King*, 696.
4. A proof was ordered to be reduced, on the petition of the bankrupt, by consent of all parties.—*Exp. v. Pownall*, 707.

REPUTED OWNERSHIP.

1. A., B., and C. being in partnership, A. retired, a balance being due to him, which B. and C. covenanted to pay by instalments, giving a power of re-entry to A. if any instalment should be unpaid; and B. and C. were also to re-assign the premises to A. on trusts for sale; afterwards, B. retired, and C. alone continued the business. Default was made in payment of an instalment; C. became bankrupt; and A. re-entered: Held, that a debt originally due to A., B., and C., was not in the reputed ownership of C., and that A. had a lien thereon.—*Exp. Pemberton*, 549.
2. Where A. bought shares in a joint-stock banking company with another's money, and told the secretary he was to hold as trustee for another; and on the same day on which he committed an act of bankruptcy, he executed

a declaration of trust: Held, that the shares were in his reputed ownership.—*Exp. Ord.* 724.

SECURITY.

When a bill is exhibited at the time of proving, and afterwards is *bond fide* lost, the commissioner should give special directions dispensing with its production on application for a dividend.—*Exp. Watts*, 586.

SOLICITOR.

1. A solicitor in bankruptcy cannot compel the assignees to pay his bill if they have no assets.—*Exp. Adams*, 706.
2. The solicitor to the petitioning creditor may petition that the assignees may pay him the amount of the petitioning creditor's costs. (*Exp. Clarke* and *Coggan*, 1 Cooke's B. L. 7.)—*Exp. Benson*, 582.

STATUTE OF LIMITATIONS.

A running account between a solicitor and another person is within the exception of the statute of limitations, and the debt on the balance is proveable.—*Exp. Seaber*, 588.

SURRENDER.

Where a true bill for felony for not surrendering has been found against a bankrupt, the Court will not order a meeting to be held for his surrender.—*Exp. Levi*, 686.

TAXATION.

1. When there are three petitioning creditors, one may petition to tax the solicitor's bill.—*Exp. Watts*, 621.
2. The Court will order a solicitor's bill to be taxed though he has commenced an action, but the petitioner must pay the costs of the action.—*S. C.*
3. An item for attending a mortgagee, summoned to attend before a Commissioner, makes the whole bill taxable.—*Exp. Williams*, 578.

TRADING.

1. A single instance of trading is insufficient, in the absence of proof of intent to trade generally.—*Exp. Wilks*, 667.
2. A lodging-house keeper not proved to have sold provisions, is not a trader within the meaning of the Bankrupt Laws.—*Exp. Wilks*, 607.

UNCLAIMED DIVIDENDS.

1. The Court of Review has no jurisdiction to order distribution of unclaimed dividends: but it can order distribution to creditors claiming. (See stat. 5 & 6 Will. 4, c. 29, s. 5.)—*In the matter of Pocklington*; *Exp. Bremidge*; *Exp. Bell*, 729, 732, 733.
2. Where the Court has made an order for distribution of unclaimed dividends before the passing of the 5 & 6 Will. 4, c. 29, the Commissioner may proceed to distribution notwithstanding that Act.—*Exp. Cricks*, 732.

USURY.

A loan on bills of three months, on which more than five per cent. interest is allowed, is within the statute 3 & 4 Will. 4, c. 98, s. 7, though collateral security be taken.—*Exp. Fife*, 568.

WAGES.

A clerk compelled to leave the bankrupt's service several months before the bankruptcy, on account of his master's inability to pay his salary, is entitled to six months' wages in full.—*Exp. Sanders*, 684.

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Whalley, Exp., 2 M. & A. 722	Adjudication, 3
White, Exp., 2 M. & A. 541	Bond, 2
Wilks, Exp., 2 M. & A. 667	Assignees ; Trading, 1, 2
Williams, Exp., 2 M. & A. 578, 616	Commissioner, 2 ; Taxation, 3

FOREIGN LEGAL INTELLIGENCE.

THE most remarkable works that have recently appeared on legal topics in France are thus mentioned by our correspondent :—

De la Charité Légale, de ses effets, de ses causes et spécialement des maisons de travail et de la proscription de la mendicité, par M. de Naville, 2 vols. The author had already written many minor tracts upon the subject, and has now collected his observations into this his greater work, which has excited much attention. It passes for the best French work on the subject. He frequently refers with commendation to the new English poor-laws.

Collection Complete, par ordre chronologique, des lois, édits, traités de paix, ordonnances, déclarations et réglemens d'intérêt général antérieurs à 1789 restés en vigueur, par M. Walker, 4 vols. This is a selection from a greater work edited in 1826—1830 by MM. Isambert, Taillandier, and Decrusy, under the title of *Collection des anciennes Lois Françaises antérieures à 1789*. M. Walker has selected those which he considers to be still in operation.

Examen Comparatif et Critique du Livre III. du Code de Commerce, et du nouveau projet de loi sur les faillites et banqueroutes adopté par la Chambre des Députés, par M. Bravard. A well-written tract. The House of Peers are expected to occupy themselves with the project during their present sitting.

Du Système Pénitentiaire aux Etats-Unis et de son application en France, par MM. de Beaumont et de Tocqueville. A new edition of their former work, with a new introduction. The text is little altered.

De la Reforme des Prisons ou de la Théorie de l'Imprisonnement, de ses principes, de ses moyens et de sa condition pratique, par M. Charles Lucas. First volume. The author, honourably known by many works on the Punishment of Death and on Prisons, has here given the results of six years of his experience as Inspector-General of Prisons in France, and has also availed himself of all notices and remarks upon the subject contained in other works, both foreign and French. The *Revue Etrangère*, for September, 1836, has an article devoted to this work.

Compétence des Tribunaux de Commerce dans leurs rapports avec les Tribunaux civils, etc., par M. Despréaux. A very complete and useful practical work.

Traité Théorique et Pratique du Droit Criminel Français, ou cours de législation criminelle, par M. Rauter, Professeur, &c. à Strasbourg. This work contains, in two volumes, as well the actual French Criminal Law (Code Pénal) as the Criminal Procedure (Code d'Instruction Criminelle.) An Introduction is prefixed, in which the principle of the Criminal Law is philosophically deduced; then follows the general theory of the French Criminal Law, namely, the exposition of the principles and rules applicable to all offences and punishments; subsequently the author proceeds to the particular offences and punishments. The work is consequently a Compendium in the German sense of the term. Lastly comes Procedure, which is treated in the same order as the law itself.

Des Moyens propres à généraliser en France le Système Pénitentier, par M. Bé-ranger. The author has already published on this subject. The present work contains his additional observations.

Traité des donations entre vifs et des testamens, par M. Poujot, 2 vols. The work of Grenier has hitherto been esteemed the best on the subject. The author of the present work, President of the Appeal Court at Colmar, has recast and completed the work of his predecessor.

The second volume of *La Théorie du Code Pénal*, by MM. Chauveau and Helie, has appeared, and the third is in the press. The 20th volume of Duranton's *Cour du Code Civil* has appeared. *La Dictionnaire Général de Droit*, par M. Armand Dalloz, is now complete. A second volume of the *Traité des Droits d'Enregistrement*, of MM. Championnet and Rigaud, has appeared. The work of Toullier, *Le Droit Civil Français*, publishing under the direction of Duvergier, is continued with the same learning and ability, and a third volume has appeared. M. Trop-Long, who is engaged on a commentary on the same provisions of the Code, has been obliged to discontinue his valuable labours for the present, on account of indisposition.

The case of de la Roncière still excites much interest in Paris. The masterly observations of Lord Abinger on this case, contained in letters addressed to de la Roncière's father (who, we believe, applied to him for his opinion) and the Duc de Broglie, have considerably shaken the former general conviction of the guilt of the accused. The Morell influence, however, is strong, and there seems little chance at present of a pardon, or even of any mitigation of the punishment.

The Sittings of the Court of Cassation recommenced in November last with an eloquent address delivered by M. Dupin Aîné, in his capacity of Procureur-Général. The subject was the restoration of the tomb of the Chancellor L'Hospital, recently restored by subscription. M. Dupin, after giving a brief sketch of the various changes of fortune through which the monument had passed until 1834, when M. Aubernon set the subscription on foot, proceeds to make some apt and striking reflections on the noble simplicity of L'Hospital's character, and the most striking passages of his life. We regret that we have no space at present for this truly admirable address. A *Notice Biographique sur M. Dupin* has appeared in the *Dictionnaire de la Conversation et de la Lecture*, in which the reputation of this distinguished lawyer and statesman is successfully vindicated from the suspicions which party malice had laboured to cast upon it. We have already given the leading events of his life in an article principally devoted to his speeches at the Bar, (9 L. M. 117.)

EVENTS OF THE QUARTER.

A CIRCUMSTANCE connected with the administration of justice which seems likely to attract immediate attention, is the accumulation of arrears in the King's Bench; there being at present more than three hundred cases of various descriptions waiting to be argued. As the judges are not inferior to their brethren in learning and ability, the chief cause of this arrear must be the quantity of business peculiarly belonging, by virtue of its original constitution, to this Court; and the only effective mode of relieving it is by putting the three Courts on an equality, or by the occasional transfer of a portion of the arrears. The first of these plans is liable to grave objections, and the last is by no means free from such, unless means could be discovered of giving the suitors an option, without which they are sure to be dissatisfied. Perhaps the best way would be to enable the plaintiff (who in nine cases out of ten is the only person liable to injury from delay) to remove a case set down for argument and more than a given period (a term, for instance) in arrear. The other Courts are by no means overburdened with work, and the progressive diminution of business during the last five years is still a subject of professional regret. This is principally owing to the operation of the new rules of pleading and practice, framed by the judges on the suggestion of the Common Law Commissioners; the cost of whose labours, so vehemently protested against by Mr. Hume, has been already repaid the country a hundred-fold. Equally beneficial results may be anticipated from the measures recommended in the Real Property Reports, if carried into effect with equal care; but in the first place it is no easy matter to get Bills drawn by persons fully competent to the task, and in the second place, when (like Mr. Tyrrell's) they are so drawn, it is no easy matter to get them passed without cobbling and tinkering by the legislature.

Of the three principal law-reform Commissions the only one still at work is that for the amendment of the Criminal Law, which appears from the parliamentary returns to have cost rather more than ten thousand pounds, yet the Commissioners have hitherto done little more than frame long, loose, chummy, common-place statements of exhausted controversies, with which the public has been bored to satiety. We should like to know how many of the members of parliament who voted for the Prisoners' Counsel Bill were swayed by the Commissioners' argument, or how many will be swayed by their Report on the Punishment of Death. The object of a Commission is to bring forward new facts, or new combinations of facts, or new views founded on established facts, or suggestions leading to direct practical reforms. The Criminal Law Commission has satisfied no one of these requisitions; the Real Property and Common Law Commissions (so far as they have been permitted to proceed) have satisfied all of them; but the Criminal Law Commission is continued at the rate of five or six thousand a year, and the Real Property and Common Law Commissions are discontinued on the ground of economy.

The Court of Chancery is as much in arrear as the King's Bench, and the stage at which the stoppage takes place is the same, namely, when the case is ripe for hearing.¹ A slight addition to the judicial force of the equity jurisdiction, and

¹ It is worthy of remark, that the French Court of Cassation was one thousand cases in arrear at the commencement of the last Session.

the establishment of a good Court of Appeal, are the remedies suggested by us in our last volume,¹ and we adhere to them. Lord Langdale is expected to bring forward some scheme or other, but, judging from his speech in opposition to the Chancellor's Bill of last Session, we fear that it will partake a little too largely of the *doctrinaire* principle to go down with either House; and the Lord Chancellor will probably make another effort, but his Lordship does not shine as a legislator, however he may shine (and we are assured that he is shining very brilliantly) as a judge. Lord Brougham, of course, will have a finger in the pie, let who will have the making or baking of it; but we incline to think that he will find himself more than ever overcrowded (to borrow a word from Spenser) by Lord Lyndhurst, whose splendid displays of eloquence and statesmanship have placed him in a higher and prouder position amongst the hereditary peerage of the land than was ever occupied by lawyer before. Nay, it may well be doubted whether Thurlow or Eldon, in the fulness of his power, ever exercised the influence (in other points there is no pretence for a comparison) to which Lord Lyndhurst, by the simple and almost careless exertion of unaided talent, has attained.

It seems clear that the Attorney-General's Bill for the alteration of the Law of Debtor and Creditor will be brought forward early in the ensuing session, and we beg leave once more to call attention to the great importance of the changes it proposes to effect, far greater than could possibly be suspected from the title or preamble of the Bill. A Local Court Bill is also threatened, and it is rumoured that the General Register Bill will be revived; but there is little chance of either of these Bills succeeding for some time to come. The Select Committee on Controverted Elections have reported in favour of Mr. Charles Buller's plan (mentioned in a former number) in its leading features—namely, that every Election Committee shall consist of five members only, and that one of three barristers (to be appointed at the commencement of each Session by the Speaker) of not less than seven years standing, shall preside. Without entering further into details at present, we may venture to say that this description of tribunal is far preferable to Election Committees on the present system, whose decisions have generally depended on the respective strength of the Reform and Conservative parties in the room.

So far as the Prisoners' Counsel Bill has been tried, it has produced pretty nearly the effects which we anticipated from it. The time required for the trial of prisoners has been most inconveniently increased, and the additional expense is beginning to press itself upon the attention of the classes on whom it has been entailed. We understand that some valuable Chairmen of Sessions have resigned, or are about to resign, in consequence of the trouble and annoyance occasioned them by the measure. We see that Mr. Ewart proposes to amend the Bill by giving the last word to the accused.

The third examination of applicants for admission as Attorneys of the Courts of Common Law took place in the Hall of the Incorporated Law Society, on the 23d of January. The acting Examiners in rotation were, Mr. Collett, one of the Masters of the Court of Exchequer, who proposed the questions in Common and Statute Law, and in the practice of the Common Law Courts; Mr. Tooke, M.P.,—in Equity and the practice of the Equity Courts; Mr. R. White,—in Conveyancing; Mr. Wilde,—in Bankruptcy; and Mr. Sweet, in Criminal Law. Fifteen questions in each department were proposed to each candidate. These were delivered

¹ Vol. xvi. (No. xxxiii.), p. 1—22.

in the Hall and required to be answered in writing before leaving it, no means of communication or reference being allowed. The number of applicants was 126; they assembled in the Hall at ten o'clock precisely, and handed in their answers to the Examiners successively, until between four and five in the afternoon. The Examiners were engaged until eleven o'clock that night, and the whole of the next day, in considering the sufficiency of the answers, and concluded their labours on Wednesday morning, by granting certificates for admission to 119 of the candidates. As the excellent system now adopted came rather by surprise on young gentlemen who had been articled and served the greater portion of their time in no expectation of any examination whatever, it was considered but just to evince much indulgence; and accordingly, on the two former examinations, all who had applied were allowed to pass. On this occasion seven only have been refused certificates; but it is understood that in future greater strictness will be evinced, with a view of gradually raising the standard of diligence and consequent ability amongst a class of men in whose knowledge and integrity the public are so deeply interested.

Mr. Serjeant Goulburn's threatened motion regarding the sinecurists of the Courts, a body of gentlemen not receiving much less, it is said, than £40,000 a year, has occasioned considerable consternation; but we trust he will not forget that fullness of patronage was in the olden time a favourite mode of compensating for deficiency of pay, and that good judges would have been procured with difficulty had not such means of providing for their families been afforded them. Vested rights, therefore, should be carefully reserved.

The Second Poor Law Report affords conclusive testimony that the most unremitting and enlightened exertions have been made by the Commissioners and their Assistants to carry out the principles of the Act, and that those exertions have been almost uniformly attended with success, notwithstanding the many obstacles unavoidably thrown in the way of a measure which interferes with so many interests and runs counter to so many prejudices. Not merely are poor-rates diminished to the amount of 40 per cent. in parishes formed into Unions under the provisions of the Act, but a marked improvement is already discernible in the habits and character of the labouring classes wherever the directions of the Commissioners have been steadily pursued.

A Memoir of Mr. Fonblanque will appear in our next Number.

January 26, 1837.

LIST OF NEW PUBLICATIONS.

An Index to all the Reported Cases, Statutes, and General Orders, in or relating to the Principles, Pleading, and Practice of Equity and Bankruptcy in the several Courts of Equity in England and Ireland, the Privy Council, and the House of Lords, from the earliest period down to the year 1837. By Edward Chitty, Esq., of Lincoln's Inn, Barrister at Law. The Second Edition. In Four Volumes royal 8vo. Price 5*l.* 5*s.* boards.

An improved Edition of a valuable book.

The Act for the Commutation of Tithes in England and Wales, with practical Notes and Index. By William Eagle, of the Middle Temple, Esq., Barrister at Law. In 12mo., price 5*s.* boards.

A Treatise upon the Law respecting Parties to Suits in Equity. By Frederic Calvert, Esq., of the Inner Temple, Barrister at Law. In 8vo., price 14*s.* boards.

A Work equally good in design and execution. All the authorities bearing upon the subject will be found carefully collected and collated in this book.

A Digest of the Law relative to Pleading and Evidence in Civil Actions. By John F. Archbold, Esq., Barrister at Law. Second Edition. In 12mo., price 16*s.* boards.

An Act for Marriages in England, 6 & 7 Will. 4, c. 85, and an Act for Registering Births, Deaths, and Marriages, in England, 6 & 7 Will. 4, c. 86, with a practical Arrangement of their Provisions, Notes, Forms, the Registrar General's Circulars, and a copious Index, adapted to the Use of all Persons. By Richard Matthews, Esq., of the Middle Temple, Barrister at Law. In 12mo., price 6*s.* boards.

The Tithe Commutation Act, with practical and explanatory Notes, and an Introduction, containing a practical Plan for the voluntary Commutation of Tithes, founded upon the Provisions of the Act, and an Appendix, of the Forms settled by the Commissioners, and other Forms. By S. R. Bosanquet, Esq., Barrister at Law. In 12mo., price 6*s.* 6*d.* boards.

Addenda to the Analytical Digest of all the Reported Cases determined in the House of Lords; the Several Courts of Common Law, in Banc and at Nisi Prius; and the Court of Bankruptcy; and also the Crown Cases reserved, from Michaelmas Term, 1834, to Easter Term, 1836; together with a full Selection of Equity Cases, and the MS. Cases from the best Modern Treatises not elsewhere reported. By S. B. Harrison, Esq., of the Middle Temple, Barrister at Law. In 8vo., price 14*s.* boards.

All Mr. Harrison's publications are useful, but it is still to be regretted that he does not afford himself a little more time for compiling them.

The Law relating to Railway, Bank, Insurance, Mining, and other Joint Stock Companies, with an Appendix, containing Statutes, Cases at Law and in Equity, Resolutions of the Houses of Parliament as to Railway and other Bills, Forms of Deeds, &c. By C. F. F. Wordsworth, Esq., of the Inner Temple, Barrister at Law. Second Edition. In 12mo., price 14s. boards.

Select Extracts from Blackstone's Commentaries, carefully adapted to the Use of Schools and Young Persons; with a Glossary, Questions, and Notes, and a general Introduction. By Samuel Warren, Esq., F.R.S., of the Inner Temple. In 12mo., price 6s. 6d. boards.

We must be pardoned for suspecting the taste and judgment of any man who thinks that Blackstone can be advantageously abridged for the purposes of legal education. A book like this may serve as an apology for smatterers, but it will be worse than useless to students thoroughly in earnest in their pursuits.

A Treatise on the Municipal Corporation Acts, 5 & 6 Will. 4, c. 76, and 6 & 7 Will. 4, cc. 103, 104, 105, Mandamus, Quo Quarranto, and Criminal Information; with practical Directions for Mayors, Councillors, Borough Justices, Town Clerks, Assessors, Coroners, and Overseers, Forms and Suggestions, for Courts of Record, Watch Committees, levying the Borough and Watch Rates, and Tables of Fees; and an Appendix, containing all the Statutes relating to those subjects. By Archibald John Stephens, Barrister at Law. Second Edition. In Two Volumes 12mo. Price 14. 8s. boards.

The Marriage and Registration Acts, (6 & 7 Will. 4, cc. 85, 86,) with Instructions, Forms, and Practical Directions for the Use of Officiating Ministers, Superintendent Registrars, Registrars, &c. By J. S. Burn, Esq. In 12mo., price 4s. boards.

The Practice of Petty Sessions, comprising all the Proceedings, as well Ministerial as Judicial, before Justices of the Peace out of Sessions; to which is added an Appendix of Practical Forms; designed chiefly for the Use of the Magistracy and Solicitors. By John Stone, Esq., Jun. of Gray's Inn.

A Work of merit and recognized utility; the circulation being already extensive.

LONDON :

C. ROWORTH AND SONS, BELL-YARD,
TEMPLE BAR.

THE LAW MAGAZINE.

ART. I.—TRIAL BY JURY IN CIVIL CAUSES IN SCOTLAND.

A Practical Treatise and Observations on Trial by Jury in Civil Causes, as now incorporated with the Jurisdiction of the Court of Session. By the Right Hon. W. Adam, Lord Chief Commissioner. 8vo. Edinburgh. Thomas Clark. 1836.

THE immediate causes which led to the introduction of Jury Trial in civil cases into Scotland arose out of the defective constitution of the Court of Session in that country, and the immense accumulation of Scottish appeals before the House of Lords. With respect to the first of these evils, we cannot do better than describe them in the words of a very shrewd and able writer in the *Edinburgh Review*, at the period when the proposed alteration of the system was first canvassed (1806).

“This court consists of fourteen judges and a president, who sit together in one body: but causes do not come before this learned crowd in the first instance. Each of the fourteen sits for a week, by rotation, in the Outer House: and takes cognizance of all the causes which come into the court during that period. If the party against whom he gives judgment be dissatisfied with the decision, he brings it, by petition, under the review of the whole court: which thus sits, our readers will perceive, only as a court of appeal. There are a few cases, indeed, which may be brought before it in the first instance; but these form a very inconsiderable part of its business. Each of the judges, it will also be observed, has thus a double duty to perform: first, to decide, singly, the causes which are brought before him in the Outer House:

and then to try, with his brethren, the appeals that are brought against the decisions of individual judges.

“ There are now, upon the average, about 150 or 200 new causes brought every week before the judge sitting in the Outer House. It is impossible, therefore, for him to hear pleadings, or to give judgment, in one-fifth part of them : and the remainder are either postponed, or an order is given to state them in writing. . . . It is calculated, that the whole time which any judge can dedicate in court, to the causes which depend before him individually, is not more than sixty-four hours in the course of a year.

“ Here is the beginning of the evils which are now felt so oppressively. The judge, having no time to hear the causes pleaded, directs them to be stated in writing. The other party answers in writing also : and at last the judge finds time to peruse these papers. If the cause is not pleaded to his mind, he orders more papers ; and when, at length, a judgment is pronounced, the losing party has it in his power to give in a written pleading against that judgment : and this he may do as often as he thinks proper, till the judge chooses to order that no more papers shall be received. He is then entitled to submit the whole cause, in the shape of a petition, to the whole fifteen judges. This petition is printed ; and the court, if the case, upon this partial statement, appears attended with any difficulty, orders the other party to print a pleading in answer to it : additional papers are frequently printed also : and after perusing all these, the judges deliberate, and give judgment openly upon the cause. Even then, however, the decision is not final ; and the losing party may argue the whole question over again in a second petition. It is only when two successive judgments have been given on the same side, that the written contest is terminated ; and then the unsuccessful litigant has no resource but in an appeal to the House of Lords. This slight view of the proceedings in the Court of Session may give our readers a glimpse of the inconveniences that result from it ; but it is necessary to look on them a little more nearly. Judges, who have no time to hear counsel plead, cannot be expected to have leisure for examining witnesses : accordingly, when it is necessary to go to proof, a commission is granted to some other person to take the depo-

sitions of the witnesses, which are all written down, and transmitted by the commissioner to the Court. No separate judgment is pronounced either by the commissioner or the judge, upon the import of this written evidence, which becomes the subject of new written pleadings before the latter; and upon the import and credibility of which, the most obstinate argument is usually maintained till the final issue of the cause. The great delay, expense, and unsatisfactoriness of this sort of proof, naturally make parties unwilling to have recourse to it; and they frequently content themselves for a long time with making contradictory averments, and endeavouring to show, by reasoning, that those of their antagonist are improbable, or that, if they were admitted, they would not make out his plea. In order to demur to the points of law maintained by their opponent, it is not necessary, as in England, to admit his statement of fact; so the parties always deny both; and they deny both in one and the same pleading. Even after proof has been taken, the same mixed form of pleading is continued; they deny that the facts are established, and they deny that they infer the conclusions deduced from them; nay, they often continue to deny that it was competent to bring any proof of them at all. Upon this mixed argument, the Judge in the Outer House, for the most part, pronounces a general judgment for one or other of the parties, without explaining particularly whether it is grounded upon the evidence or the law, or upon both; and from this judgment an appeal is taken to the whole Court. Those who are accustomed to the accurate forms of pleading established in the southern part of the island, will have difficulty in perceiving the extreme looseness and prolixity of the written papers that are given in, even in this mature stage of the proceeding. It is rare that either of the parties will admit a single fact, or a single argument maintained by his opponent; and as it is equally open to them to make new assertions, and to offer new proof, as to argue against all that has been already obtained, so there is no latitude in which they may not indulge themselves in the statement and illustration of their cause. They may quote any decision of any Scotch, English, or foreign Court, and refer to the authority of any lawyer from Papinian to the present Attorney-General; they

may argue from topics of law, equity, or general expediency; and may embellish their arguments with quotations from Shakspeare, or choice morsels of Horace. According to the vein of their advocate, they may be witty, humorous, or pathetic; and may sprinkle their performances with bon mots, or political sarcasms or allusions. The expense and delay of preparing these elaborate treatises may easily be conceived. They are indeed merely speeches in writing, with this additional disadvantage, that though a lawyer may be stopped when he wanders from the point in his pleading, the unfortunate judge has no resource when he chooses to digress upon paper, but must plod through the whole mass of eloquence that is laid before him. The oppression to which these learned persons are thus subjected is almost incredible. It was calculated by one of their own number, about twenty years ago, that every judge had to read, in the course of six months of session, about 25,000 quarto pages of printed pleadings; and very nearly as much as half more in manuscript from the Outer House. The quantity is now, we believe, one-fourth part greater.”¹

We make no apology for this long extract from the discussions of an antiquated epoch in the course of law reform; because it is important to consider, what were the precise inconveniences sought to be remedied, before we pronounce upon the causes of the success (if any) which has attended the remedy. Now in this enumeration, by a practised lawyer (we presume the present Lord-Advocate himself), of the evils of the Scottish system, we find none of those particulars in which, *à priori*, the advantage of a jury over a judge in questions of fact is supposed to consist. We find no complaints of prejudice and partiality on the part of those high functionaries—no complaints of their incapacity to decide on the truth in matters unconnected with their every-day observation, such as commerce and agriculture; none, in short, of those defects which the theoretical panegyrists of trial by jury assure us are remedied by that institution. But we find a long list of collateral abuses inherent in the Scottish tribunals generally—a loose and negligent system of pleading—

¹ Edinburgh Review, vol. ix. p. 468, &c.

an inconvenient division of judicial functions and apportionment of judicial duties—all the numerous evils which are inseparable from the system of written evidence, as the experience of our own equity courts abundantly proves—and a very inartificial complication of issues of law with issues of fact. These inconveniences were of course, for the most part, increased, when matters were removed by appeal to the House of Lords ; on which subject Lord Commissioner Adam makes the following observations :—

“ The arrear of appeals from the Court of Session to the House of Lords (in 1806) had become overwhelming ; and were so liable to increase, that it became necessary, not only to apply some remedy to clear away the arrear, but also to provide the means of preventing future accumulation. Many appeals turned upon pure fact ; the manner of examining into which produced immense volumes of evidence, much of which was irrelevant, and much inadmissible. Trying such questions by jury was likely, therefore, besides dispatch, to be attended with two admirable effects—1st, stopping such cases from being brought by appeal into the House of Lords ; 2dly, creating a judicial system calculated greatly to ameliorate both the general law and the law of evidence. *For it is a remarkable, but a just characteristic of trial by jury, that though its object is apparently to dispose of the facts by the verdict of twelve men, that in truth, by the separation of the fact from the law, it gives a certainty and precision to the law, unattainable when they are complicated and mixed up together.*”—Appendix, p. 92.

This is a remarkable passage, because it shows how inseparably the *legal accidents* of an institution are apt to become confounded in our minds (especially professional minds), with its *essential characteristics*. The benefit arising from the separation of law and fact admits of no doubt ; but the real question, whether an issue of fact is best decided by twelve casual arbitrators, or by one experienced and able judge, is wholly unconnected with this obvious truth. In Charles Lamb's celebrated Essay on Roast Pig, the first discovery of that delicacy is said to have been owing to an accidental circumstance ; viz., the burning of a house with a pig in it. Hence the burning of a house became established in the public mind, not as the accidental, but as the exclusive means whereby a pig might be roasted ; and whoever invited

his friends to partake of it, made a sacrifice of his premises in order to treat them. And it was long, adds the ingenious writer, before the national mind became persuaded of the fact, that by simply burning a few sticks the same object might be better attained, through an infinitely less expensive method. So it is with trial by jury. All the advantages of our English common law process are very naturally associated in our minds with that which is its most notorious and public feature: we totally exclude from our consideration the question, whether or not that feature might be altered or dispensed with altogether, and yet the same advantages remain. The benefits of oral evidence—the benefits of the divarication of law and fact,—these are all inseparably connected, in vulgar estimation, with “twelve honest men in a box;” and whoever seeks to establish the position, that those benefits may be retained with a safer and a less cumbersome tribunal, will probably have as much prejudice to encounter as the philosopher who first preached to the Chinese the means of roasting a pig without immolating a dwelling-house.

We will resume this question presently, but must first return for a space to the historical part of the treatise before us; in which we could have wished that the author had indulged in greater details, if the practical character of his essay would have allowed it. It was under the Fox and Grenville ministry, in 1806,¹ that the first attempt was made, by Lord Grenville himself, to introduce trial by jury in civil cases into Scotland; before that period, it existed only in criminal trials and in Exchequer cases. A bill was brought in (Lord Eldon being dubious rather than adverse), printed, and circulated, but fell to the ground with the ministry. In 1808 Lord Eldon took up the question as Chancellor; and a Law Commission was appointed to examine into the benefits of the proposed changes,

¹ The Court of Session in Scotland was modelled on the parliament of Paris; and its institution was in fact one of the many usages which the Scottish nation borrowed from the French during their long political connexion. (Trial by jury, and oral evidence, were customary in Scotland as well as in England in earlier times.) We may add to the list of its defects, that the ordinary mode of taking evidence was extremely bad; commissions being granted, frequently to very incompetent individuals, to examine witnesses on the spot, and send up their depositions in writing to the Court.

of which (so far as the introduction of trial by jury was concerned) that great lawyer seems still to have been distrustful. The Commission reported favourably, but with hesitation. Their report lay unnoticed for some time, but "before the end of 1812, several cases, turning upon facts alone, had created considerable embarrassment in the Scotch appeal jurisdiction in the House of Lords;" and the pressure of practical inconvenience, as usual, at last forced on the long delayed reform. Mr. Adam, the author of the treatise before us, then Chancellor of the Duchy of Cornwall (being very largely concerned in Scotch appeal business) was consulted in 1814 by the government of Lord Liverpool; and the bill prepared accordingly was carried through both houses with the approbation and assistance of nearly all the lawyers of eminence. By this enactment power was given to the Court of Session to direct in any action, if it should see fit, an issue or issues to be tried by a jury of twelve men. The reason of this important difference between jury trial as customary in England, and as introduced into Scotland (the issue in the former evolving itself out of the pleadings, and being directed in the latter by the judges in concurrence with the suitors), is obvious enough. The Scottish mode of pleading by condescendences and answers is loose and argumentative, and not subject to the discipline of demurrers. Hence it was impossible to leave the questions for a jury to be extracted by force of law from their details. The forms of proceeding were in other respects strictly modelled on those of England: even unanimity of jurors, much to the dissatisfaction of many Scottish lawyers accustomed to the contrary practice of their country in criminal cases, was rendered necessary. A peculiar Court was established, under the name of the Jury Court, for the trial of these issues; over which the writer of the treatise before us was appointed to preside. These issues were framed from the process or written instruments before the Court; the "counsel and agents of the parties attending the clerks and the judge, discussing the subject, not in formal argument, but in quiet conversation." But it appears, according to the Lord Commissioner, that it has not hitherto been found practicable to leave these issues to be framed by the law advisers of the parties, and that the intervention of special officers, (clerks of the Court, styled

issue clerks,) has been always found necessary to reduce them into systematic shape. The first act was passed as an experiment, and its duration limited to seven years. In the mean time, however, it received some amendments at the hand of Lord Meadowbank in 1819; and it was again amended in 1823, at the expiration of the seven years. By these amending acts some species of suits were made absolutely Jury Court causes, *i.e.* the Court of Session was not only authorized but directed to grant issues in them. Finally, in 1830, the experimental Jury Court was dissolved altogether, and its powers transferred to the established tribunal of the Court of Session itself; and trial by jury was thus incorporated with the regular judicial system of the country.

It will be seen at once by the English lawyer that the Court of Session was, and still remains, very similar to our English courts of equity, only possessing a more comprehensive jurisdiction; and that the mode of preparing questions of fact for trial by a jury is similar to our own practice of sending down issues for trial from one of these latter courts. The chief difficulty which the new institution has had to encounter, has been in the framing of these issues; which at first were uniformly, to use a phrase intelligible to English lawyers, special in point of form; while of late years the endeavour of the controlling authorities seems to have been to render them as *general* as they could conveniently be made. Great part of Mr. Adam's treatise is devoted to the consideration of this question, respecting the most eligible mode of preparing issues; and he leaves it after all in much uncertainty. It is in fact the great problem to be resolved in reforming any system of pleading—as has been practically experienced in our own—how far we may safely proceed in limiting by precise and special propositions the question or questions to be tried by the judge of the fact in each particular case. The danger of too general an issue is not merely that of confounding fact and law, but also that of surprise on a party who is not prepared for the case which his antagonist may choose to rely on,—that of too minute and specific pleadings, in the narrowing the general merits of a complaint or a defence until the decision may take place at last on an issue merely collateral. Between these two extremes the judges whose duty

it is to controul pleadings will perpetually oscillate, and this is a defect absolutely inherent in the system of jury trial, where one class of functionaries have to prepare for adjudication disputes which are finally to be decided by another. It was in 1823 that the occasional use of general issues was first introduced into the Scottish Jury Court: previously to that time, special issues defining particularly the question to be tried were always framed out of the pleadings (technically termed summons and defences, condescendences and answers) by the officers of the Court. Mr. Adam's experience inclines him decidedly towards the use of the general issue, which he has endeavoured to introduce as far as practicable. His observations on the relative merit of these two modes of arriving at truth may be perused with some advantage by English lawyers, as the result of the experience of one who has been so largely concerned in the introduction of the English system into a foreign country :

" I shall, in what follows, use the words general issue (the meaning of which is obvious) in contradistinction to general issues upon the points of the cause ; and I shall adopt, in my further discussions, the phrase, *special issues*, to express more shortly general issues on the points of the cause, and to render the contrast with the general issue more distinct.

" A general issue embraces all the questions for trial, which belong to the action, in respect of which the issue is framed ; each separate point, as it arises in conducting the cause, must be attended to by the judge, and laid distinctly and separately before the jury ; thus the characteristic feature of this issue is to leave to oral statement, by the judge, the different points on which the jury are to find their verdict. Or, in other words, by means of the general issue the law is separated from the fact during the trial, the judge taking care that that office is performed correctly in his observations to the jury ; and the points of the cause on which they are to find their verdict are brought before the jury orally, after the evidence is known, instead of having the separation of points effected by a special plea put upon the records.

" Special issues, therefore, on the other hand, present in writing the precise question to be tried. A judge, in directing a jury under a general issue, has (besides his direction on the law) two operations to perform ; first, to point out the question to be tried, if there is only one, and then to tell the jury what points they have to make up

their minds upon, in order to form their verdict. In a special issue, if there is only one, the judge need only say, reading the issue, this is the question you have to try ; and then he has to tell the jury, as in the case of a general issue, upon what points they have to make up their minds to enable them to form their verdict. If, in the general issue, there are several questions, the judge has then to state those questions distinctly and separately, and then to tell the jury, as applicable to each of them, the points for consideration on which they are to make up their minds to form their verdict.

“ If there are several special issues to be tried in the same cause, the judge has to refer to each of them by reading them, and then to tell the jury, as applicable to all the issues, the points arising in each of them, on which they have to make up their mind, in order to form their verdict. To recapitulate, the features of distinction then are these : where the issue is general, the point or points of the cause are stated orally ; where the issue is special, the point or points in the cause are reduced to writing in the issue. The feature in which they agree is, that the points on which the verdict of the jury is to be formed are in both cases to be stated orally by the judge to the jury. The oral statement on the point to be tried under the general issue, besides the explanation given by counsel at the bar, can be collected with certainty by the various pleadings in the cause out of which the issue is framed, viz. out of the summonses and defences, and the condescendences and answers. The advantage attending the course of proceeding by general issue is, that the judge can put the point or points of the cause in various lights, so as to secure the understanding of it by the jury, and yet can leave it with sufficient precision for their consideration. In the case of general issues, whatever may be contained in the various proceedings in the cause, is limited by the precise meaning of the words of the issue. Here the advantage is precision, but the disadvantage is a limitation, which may not embrace all that is necessary finally to decide the question between the parties, whereas the general issue ensures it, provided the previous proceedings in the cause contain all the matters of difference between the parties ; and as the previous proceedings in the cause can be so managed as to combine pure averment with the whole matter in difference, the result is, that the oral statement on the points of the cause being regulated by those previous proceedings, the security against surprise, as has already been observed, is perfectly attained.

It has always appeared to me, that although precision is the characteristic feature of the special issue, the judge in dealing with that issue, (especially if there are more points than one, causing several

special issues,) labours under greater difficulty and embarrassment in stating the points for the consideration of the jury, on which to form their verdict, than in dealing with the general issue to the same extent, or on the same number of points.

“In presiding over and directing juries, as far as my experience goes, I always found it attended with the greatest advantage, to have the question tried under a general issue, by being enabled to state all the points fully, and to observe on them in concordance or in contrast with each other; and by stating the question or questions of law belonging to each, and pointing out to the jury how they were to apply their opinion upon the evidence to the matter of law so stated.”—p. 33—37.

The following authority may also be cited on the same side, being (as Mr. Adam states) the substance of a letter which he received from Lord Eldon, in February 1825:—

“‘He (Lord Eldon) could never understand the system of sending issues of specific fact by the Court of Session, instead of general issues. If it was to be stated to him that such issues excluded statement of law to the jury, and the general issues differed in that respect, his experience would have led him to a contrary conclusion: he was not aware that he *had ever sent a question of one simple fact to a jury, in the trial of which a question of law might not arise*,—law which the judge at the trial would state to the jury, and whose opinion might, in some form after trial, be reviewed. . . . The same necessity for stating matter of law, if a general issue is split into a dozen specific questions of fact by a dozen issues, exists, as if there were only one issue (a general issue), but in the trial of which a dozen questions of fact, not specified by such splitting, must come to be decided. Therefore (he says) I always use the general issue, if the facts to be tried are many and complex.’ And his Lordship referred to his own judgment in the celebrated case of the Earl of Fife v. the Earl of Fife’s Trustees. (House of Lords, 1823.)”

There appear, nevertheless, to be differences of opinion among the Scottish practitioners respecting the advantages of the general issue. And our author admits, that the change which took place in English pleading under the new rules of 1832 has not been without its influence in Scotland, and has operated to check the courts there in the course which they were gradually pursuing. The Scottish Law Commissioners, in their Report of May 1834, *against* the expediency of intro-

ducing trial by jury into the Sheriffs' Courts, notice this vacillation of practice:—

"Among the difficulties to which we have referred," say they, "we may be allowed to mention, as one of the first magnitude, the adjustment of issues. That is a subject on which the greatest variety of opinion has prevailed, from the very first attempt to introduce jury trial into Scotland down to the present day: and the practice has been as various as the opinions. At first, the dread of giving juries an undue control over the law of the case, prompted the experiment of special issues, which should embrace all the material and disputed matters of fact. This was at length found to be unmanageable as a general and unbending rule of practice, and a more general issue began to be introduced in many situations with much advantage. But recently it has occurred to a great majority of the judges, that the use of the general issue has been carried so far as to endanger the law applicable to certain important classes of cases of very frequent occurrence in practice; and in these cases it has been judged expedient again to limit the issues. We do not presume to suggest or indicate any opinion on this very difficult question, but refer to it merely as a striking illustration of the hazard of extending to the inferior courts an experiment which, after so long a time, has, even in the supreme court, left a matter so essential to the success of jury trial as the adjustment of the issue, a subject of discussion or doubt."¹

Thus the Scottish lawyers appear to be still on the contrary tack from ours; they are beginning to be apprehensive of evil results from the substitution of general for special issues, and to evince a desire of retracing their steps towards the latter; just as we, after a vigorous effort towards abolishing general issues altogether (by the rules of 1832), are progressing towards their re-adoption in particular cases—e. g. in the notorious instance of admitting the replication *de injuriâ* in actions of *assumpsit*.

In all other respects, the system of jury trial in Scotland, as to the conduct of causes both in court and out of court, is borrowed from that which has so long prevailed among ourselves.² We have said that the unanimity required of a jury

¹ See Mr. Adam's Appendix, p. 18; and Mr. Bell's *Examination*, &c., published in 1825.

² The Scottish Courts have introduced one little innovation which may occasionally be very useful: printed copies of the issues are put into the hands of the jurors before the case is opened.—p. 175.

is at variance with the old Scottish practice in criminal and revenue cases : so also is the order of speeches by counsel at the trial. In criminal cases, the evidence is first gone through on both sides ; the counsel for the prosecution addresses the court ; the counsel for the prisoner replies : the former may, if he pleases, rejoin ; but the latter has, in this case, the privilege of a second reply. There are obvious reasons why this practice should have been departed from in civil cases, so far as to allow the prosecutor the benefit of an opening speech. Without such assistance both judge and jury would be too much in the dark as to the nature of the case they are to try. But with this exception, we confess we have considerable doubts whether the English practice, however it may be endeared to us by long familiarity, is in reality conducive to the interests of justice ; although Lord Commissioner Adam seems to treat its introduction into Scotland, along with the other features of our process, nearly as a matter of course, and makes very light of the opposition that was made to it (pp. 158, 159). It is of course sufficiently evident that the subject, look at it which way we will, presents only a choice of difficulties. But we cannot help thinking, that one unprejudiced in favour of any particular arrangement, must look upon ours as expressly framed for the promotion of vexatious defences and the discouragement of substantial ones. Any one who has an answer to make to a complaint brought against him, has in general witnesses to substantiate that answer. But if he venture to call them, he exposes himself to the terrific visitation of the plaintiff's reply. On the other hand, the defendant, who has no witnesses, has, in nine cases out of ten, no meritorious defence at all ; and the law has armed this unworthy champion with the power of the last speech, as if on purpose to chicane, perplex, and worry his deserving antagonist. But some one, it is answered, must always have the last word, with all the advantages appertaining to it. We suspect that those who use this argument as a sufficient defence of our custom, have not looked at the matter beyond its surface. The disadvantage of losing the last word is not the only one, nor the chief one, under which the honest defendant labours if he calls witnesses ; there is also that of having no speech to sum up his evidence—a disadvantage

which the plaintiff has equally to endure, when he is opposed to a defendant who has no witnesses. In either case, it is the *presumably honest party* who is put in the most disadvantageous situation ; and we consider it of such essential importance to fair play between the parties, that each should have the benefit of summing up his own evidence, that our own inclination, notwithstanding the additional length which proceedings would thus acquire, is strongly in favour of that mode of conducting a trial which is now best known as prevailing at sessions in appeal cases. If the defendant calls witnesses, he ought, in our opinion, to have the benefit of a second speech at the close of his evidence : the plaintiff's reply, now so irresistible a weapon in a skilful hand, would then fall comparatively blunt. According to Sir Frederick Pollock, this would be in accordance with ancient practice :—

“ In Ireland” (says Sir Frederick, in his evidence before the Commissioners of Criminal Law) “ at the present moment, if the defendant calls witnesses in a civil case, one counsel opens the case to the jury, and another counsel, at the close of the case, addresses the jury upon the effect of the evidence ; and in many cases it is essential to the attainment of justice, that the defendant should have that privilege ; it is fallen into desuetude in this country, except in certain cases ; it still prevails in commissions of lunacy, in proceedings before the House of Commons, in cases of high treason, and I am told in some cases at the quarter sessions : and it is the opinion of some learned judges, I believe now, that it ought to obtain in civil cases : and any person acquainted with our trials by jury must be aware that, unless the defendant *has the means of setting some little matter right where his statement to the jury is different from the evidence actually produced, injustice very often is done.*”

But Sir Frederick appears to forget, that the plaintiff stands quite as much in need as the defendant, of having the power of setting right to the jury any inconsistency between his opening speech and the evidence he has adduced ; and that by the practice which he here recommends, the plaintiff is still deprived of this advantage unless the defendant calls witnesses. The only refuge from this dilemma is in the practice which actually does prevail in appeals at quarter sessions, and which Sir Frederick Pollock seems in some degree to

have misapprehended ; viz., that each party calling witnesses should have a speech at the beginning and a speech at the end of his evidence, with a final reply for the plaintiff after the second speech (if any) of the defendant. This mode, though somewhat prolix, we fully believe to be more satisfactory and more equitable than any other.

We have not space to follow Lord Chief Commissioner Adam into the details of the work before us ; nor, in truth, would they prove in general peculiarly interesting to our readers. The writer's comments are indeed often valuable and instructive, as well as the dicta of grave authorities which he has brought together in support of some of his views ; but to several of his lucubrations, (as may be naturally conceived from the short experience which his countrymen have yet had of jury trial,) an English student might apply Sir J. Mackintosh's answer to Baron de Stael, " we take all that for granted." The first head of his Treatise relates to the framing of issues, on which we have already made some remarks ; the second, to the conduct of trials ; the third, to new trials ; the fourth, to bills of exception ; the last, to special verdicts and special cases. It is to the fourth of these subjects, being ground comparatively little trodden by our own law writers, that the attention of English readers will probably chiefly be called in perusing the work before us. This ancient mode of obtaining a correction of errors in point of law, which has been so extensively superseded among ourselves by motions for new trial and special cases, has been very carefully and successfully put in practice in Scotland ; and we believe that, for this result, the profession is mainly indebted to the efforts of Mr. Adam himself, and to the suggestions of Lord Eldon.

But, before concluding, we are anxious to return for a short space to the general question of the expediency of jury trial in civil cases. It has formed, as our readers will assuredly bear us witness, no part of our ordinary ambition to enrol ourselves among the zealous reformers of our institutions. The general scope and tendency of our labours in this matter have been conservative ; and we have often felt it a duty to point out the defects and inconsistencies of the various compre-

hensive schemes of law reform which have been brought from time to time under our notice ; deeming it the better part of the office of the philosophic jurist to amend, rather than to remodel ; and of the legal critic to point out the difficulty and peril of extensive alteration, rather than to foment that spirit of dissatisfaction which is so easily excited against all legal systems and institutions whatever. But when the subject before us is one which necessarily brings back our attention to the first elements of jurisprudence, then we cannot think the freest and most speculative investigation misplaced ; and feel that the salutary prejudices (if such we may term them) of the practical lawyer are for a time to be laid aside. In discussing the expediency of trial by jury in civil cases as a general question, we are advocating no specific change in our own jurisprudence ; and, were we inclined to do so, we feel that this usage is far too intimately interwoven with our system to admit of the bold experiment of its abolition, although it is in each successive generation more and more evaded and superseded by the increasing power of courts of equity—by the frequency of arbitrations—by those improvements in our system of pleading which have brought the issue more directly under the eye of the judge before it is submitted to the hazardous determination of a jury. But when the subject before us relates to the introduction of this same system into a new country, with all its peculiarities and eccentricities of detail, like a full-grown tree, transplanted with the earth clinging to its roots into a distant soil, we feel ourselves at liberty to canvass it with all the boldness and impartiality with which foreign institutions are criticised.

We would willingly assume, as far as our argument is concerned, that the evidence is in favour of the experiment having worked well in Scotland. We are not disposed to rely alone on Mr. Adam's panegyrics on the system, because he is clearly and not unnaturally prejudiced in its favour. He had a great hand in its introduction, and to his management of it when placed at the head of the Jury Court no small share of its good success, whatever that may have been, is fairly attributable. His reputation in the professional world has been as it were identified with it ; and it has procured him the satisfaction of many a compliment and con-

gratulation from the sages of the law with whom he has been placed in contact, which are all very accurately reported in different parts of the volume before us. But we believe we might refer to the testimony of considerable names, both among lawyers and the laity in Scotland, in its favour. In the article from which we have quoted at the beginning of this paper, the *Edinburgh Reviewer* (whom we cite because that journal was then conducted by some of the ablest advocates of Scotland, and may be fairly taken as an index to professional opinion), has brought together with no common skill all the arguments against the adoption of trial by jury in civil cases; and concludes by voting in favour of it merely as an experiment, and as the only method yet suggested of remedying the abuses of the existing system. In a later number, published not many years after the introduction of that experiment, we find it already spoken of as the most important reform in Scottish jurisprudence which has been effected in the course of the present century. Yet it may be mentioned, on the other hand, that the law commissioners of 1834, do not appear so perfectly satisfied of the success of the innovation, when after twenty years experience they refuse to extend it from the superior to the inferior courts of the country. "Many of the difficulties that early presented themselves as a bar to its utility," they say, "still exist. The pleadings are improved, and the practitioners more conversant with the general machinery of jury trial; but much remains to be done before it can be fairly incorporated in our practice, and points of essential importance to its success are still matter of discussion in the profession, and even among the judges themselves." When we find that the ablest Scottish practitioners seem still to have acquired very little insight into the practical management of jury trial, when the same Commissioners report that "it would be useless to pursue for £100 before a jury in Scotland, even with the certainty of gaining, *as the costs not admitted would cover the sum.*" When we find (if we do not misunderstand the returns) that not above fifty or sixty cases on an average are brought before a jury in the year;—and still more, when, notwithstanding this paucity of cases, we observe one ominous token apparent on the very face of the Lord Chief Commissioner's book, more than one

half of which is occupied with the discussion of new trials, special cases, bills of exception, and other ingenious devices for correcting the errors of those very juries which he delights to panegyryze,—we cannot avoid entertaining a suspicion that Bentham's prophecy has come to pass, that the experiment in Scotland has in reality *failed*, and a most costly experiment it has been.

But whether it has failed or succeeded makes little difference to our argument. Were we to admit the amount of benefit which is claimed as the result of this institution in Scotland by its warmest partizans, we should still feel that our original question remained unanswered,—whether the benefit was derived from the actual institution of the jury itself, or from those other *collateral* advantages which belong to our mode of jury trial. The most important of these are, as we have said, the admission of oral evidence,* and the separation of questions of fact from questions of law, both of them utterly unknown to Scottish civil jurisprudence before the reform of 1815. It may be worth while to look a little closer at this subject.

We have said that the manner in which questions of fact are submitted to a jury in Scotland, notwithstanding the partial adoption of the general issue, still resembles no part of our practice so much as the mode of sending issues out of a court of equity to be tried before a common law judge. And surely there is no one part of our system which seems in itself so repugnant to reason, and which causes so much of vexation, and even of injustice, as this custom, by which a Chancery judge feels himself obliged in certain cases to abdicate his functions when the litigation before him evolves a disputed matter of fact. After all the expense and delay of the preparatory steps of a suit in equity; when both the Court and the parties have begun at last to see their way, and a reasonable prospect appears of the final decision of their quarrel,

* The Quarterly Reviewer of the Lord Chief Commissioner's book informs us that Dugald Stewart's Scottish prejudices against jury trial in civil cases were converted into admiration, by the accident of his witnessing an able cross-examination in an English court, on a case of trespass to real property. This is an additional illustration of our position. Dugald Stewart's admiration was not of the jury itself, but of the mode in which truth was elicited for its adjudication.

they are all at once sent abroad to stake the event on that most uncertain of all hazards, the verdict of a country jury. The matter is probably a difficult one, perhaps a question of pedigree, of boundaries, of the customs of a manor or liberty; all points which may depend on a nice balance of conflicting evidence, or on the careful piecing together of loose and disarranged fragments of testimony. What a spectacle does such a proceeding exhibit to one uninfluenced by the ancient English prejudice in favour of trial by the country! That which on such occasions is really the best evidence,—the researches namely of impartial inquirers, the testimony of books and antiquarians,—is carefully excluded by the unbending and necessary strictness of the law. The greater part of the trial is usually spent in wearisome contests, arising out of the efforts of advocates to insinuate *inadmissible* evidence, for the purpose of prejudicing the minds of the jury which they are not permitted directly to influence by its production. The judge, labouring almost wholly in the dark and often unable in the least degree to comprehend the tactics of the opposing parties, is so closely occupied in watching and defeating their various manœuvres as scarcely to have time for weighing the legitimate evidence before him. The leading counsel, well aware of the imperfection and ineffective nature of the testimony on which their case rests, rely almost wholly on their own powers of declamation or sophistry, and often sacrifice the most essential parts of their respective cases in order to jockey each other out of the reply. The jurors, wearied, out of humour, and for the most part wholly unaccustomed to habits of attention and investigation, decide as fortune pleases, their best chance of avoiding error being, to shut their ears perseveringly to the blandishments of counsel, and follow, if they can catch it, the leaning of the judge, who himself, conversant only with that very small proportion of the facts of the case which has been elicited in the *vivâ voce* examinations, has to grope throughout his summing up after those slender glimpses of light which the course of the trial has afforded him.

Is there any one conversant with English courts of justice, who will accuse us of having too highly coloured this picture? And is there any one, seeking the decision of a naked ques-

tion of property and confident in the justice of his cause, who would not rather submit it to the decision of a single enlightened arbitrator, than to that of any twelve among the yeomen or squires whose rustic names appear on the sheriffs' slips of parchment?

If this be so obviously the case, the question inevitably forces itself on our minds, why judges in equity, with a large portion of the facts of a case already elicited and elaborately displayed before them, are so often reduced to desire the assistance of a verdict in a court of common law? We cannot bring in a more competent witness to answer this inquiry than Lord Eldon himself—the great leviathan of chancery, or *chancelier-monstre* of modern times. In the case of *Smith v. Macneil*, (July 1814,) 2 Dowl. 544, he is reported to have expressed himself as follows:—

“He could not help saying, that this was one of those cases which compelled one extremely to lament the want of inclination which prevailed in Scotland, to adopt trial by jury in civil proceedings. It might be introduced gradually—first, for instance, in questions relating to boundaries in great wastes. He would be a bold man who would say that this house was as competent to decide such questions as a jury would be, who might be acquainted with the *indicia* of these boundaries. It had often occurred to him in reading these cases, as it sometimes occurred to him in Westminster Hall, that if, instead of being confined to the deposition in his hand, he had a witness before him, he would ask him a hundred questions, in order to get at the whole of the case; and equity here *might in such cases direct an issue, in order to get at the better mode of examination.*”

Here—and we say it with the reserve of the unfeigned respect due to the authority of the judge in question, who perhaps has never been equalled in point of intimate acquaintance with the practice of *both* branches of our jurisprudence—we cannot but think that Lord Eldon has advocated trial by jury as English lawyers generally do, for the sake of its collateral and not its intrinsic advantages. His first reason appears to be, that a jury *may* be personally acquainted with the subject-matter in dispute—a case, as we all know, of

¹ See Mr. Adam's Appendix, p. 96.

such rare occurrence as to be of very little weight in balancing the general merits of the institution. But his second reason expresses, as we take it, the very feeling which induces equity judges to grant issues where they can—the desire, namely, that the case may be investigated by *oral examination*. Give the judge this power for his own use—let him have the advantage of the presence of the witnesses, and of their subjection to the questioning and cross-questioning of counsel—and is it to be supposed that he, acquainted with the merits of the whole cause, and having assisted throughout at the gradual development of the truth, would feel the slightest wish to shift the responsibility of decision from his own shoulders to those of twelve jurors, whether common or special? We are not unmindful of the great controversies which have been excited by the question, whether or not oral evidence should be admissible in Chancery: it was much and ably discussed before the Chancery Commission of 1825. We are quite aware also that its introduction would be in effect an entire revolution in our jurisprudence,—that courts of equity must be put on an entirely new footing to enable them to undertake the additional amount of business which would thus devolve on them. But we are not now engaged in the consideration of practical reform so much as of abstract theory; and we have little doubt that a court armed with the powers and advantages which a court of equity possesses—especially that of examining the parties to the suit on oath—together with that of oral examination, now almost confined to the courts of law (being rarely employable and still more sparingly practised in the masters' offices), would be as far superior to any tribunal which we now possess for the discovery of truth, as the decision of a single practised and vigorous mind is to the sentence of a dozen chance individuals, ignorant, timid, and corruptible. *Vivâ voce* evidence, and the examination of parties, are a pair of powerful implements, sharp as two-edged swords for the dividing asunder of truth from falsehood. Our jurisprudence has discreetly determined that the use of two such weapons was too great an advantage to entrust to either tribunal, and has accordingly allotted one of them to each. Common Law and Chancery are, like the beautiful brother and sister in Martial's epigram—"Lumine

Acon dextro, capta est Leonilla sinistro"—and could either of the tribunals accomplish the poet's wish, by borrowing the single eye of the other, we suspect that justice would be often a gainer by the transaction.

What this imaginary Court might be among ourselves, such a tribunal the law reformers of 1815 could, if they pleased, have erected in Scotland. Nay, they might have done more; for, as the jurisdiction of the Court of Session extended far into the domains of equity as well as of common law, they might have applied to many of those cases which, among ourselves, are subject to the very imperfect process of equitable jurisprudence, the benefits of *vivâ voce* examination, and the other advantages of trials at common law. They might, in short, have selected and united the best features of both the systems, without running any of that danger which would be incurred in England by their forced amalgamation. They might have constituted a judge, whose decision should have been equivalent to the verdict of a jury; who might, in the same manner, have received the issues sent down to him from the Court above, divested, as far as the means of that Court would admit, of all legal ambiguity; and who might have effected, in his own breast, the separation of the naked question of fact from the residue of law still mixed up in those issues, more quickly and certainly than our complex tribunal of judge and jury is now able to do. They would thus have secured to that nation the benefits of a cheaper, more expeditious, and far more satisfactory, because more public, trial of civil rights than is enjoyed by any continental people; free, at the same time, from the obstructions interposed by the incompetency and ignorance of juries between the Court and the parties in England.

Trial by jury in civil cases was once known, in one form or another, to every people of the Gothic stock. All probably felt it as an incumbrance; for all, except ourselves, gradually discarded it. But their own intelligence was insufficient to provide a substitute. They lost with it all the benefits of open trial, and fell under the cumbrous process and manifold chicanery of the degenerate Roman law. We alone retained, and jealousy guarded it, associating it by some confused mode of reasoning with the preservation of our national

liberties; and as our process was gradually improved, and the machinery of our courts of law became in the main more excellent than any similar institution has ever been, we admired and cherished it the more, and persuaded ourselves that the very heart and vivifying principle of the whole system lay in *that* which more dispassionate observers might have pronounced a needless and unsightly excrescence. The system might have been freed from that excrescence; if not by ourselves, at least by the Scots, and perhaps by the Americans.¹ Both threw away the opportunity: and it is perhaps more satisfactory to our national vanity that they did so; otherwise, instead of floundering *behind* us, as they are now doing, in the mire of our own old and narrow lane, they might have been advancing many a league a-head of us in the railroad of modern improvement.

We have studiously avoided any allusion to trial by jury in criminal cases, the excellencies and defects of which are, in great measure, of a different character, and embrace many additional considerations; and it must be remembered, that under the same category with criminal cases, should be ranged a great many of those which our law regards as civil—complaints arising out of simple injuries to person or property, such as assaults, libels, slanders, and many species of trespass not involving the trial of a right. All these we leave apart; merely observing, that the ordinary arguments drawn up in favour of trial by jury by our writers on jurisprudence apply to them most forcibly, if not exclusively, and are often utterly out of place when employed to prove the universal excellence of the institution.

¹ The question has of late years been much discussed in America, and many of the most enlightened American jurists have declared against trial by jury in civil cases.—*Edit.*

ART. II.—LIFE OF LORD KENYON.

It is related in the amusing life of Sir Leoline Jenkins that the French courtiers seemed to entertain but a mean opinion of him, being not a man of finesse, or of easy carriage and assurance, and that one of them, more conceited than the rest, asked him in what place or country he was born? Sir Leoline answered that he was a Cambro-Briton; but the Frenchman being still at a loss, desired to hear some of the language of the place, and the expression he chose was "*Nid with y bag mae adnabod cyfflydy*," which is a Welch proverb signifying that the goodness of a woodcock was not to be known by his bill. The quaint truth of this national adage was not more applicable to the homely but excellent Admiralty judge than to the subject of the present memoir. Seldom have great talents and profound acquirements been arrayed in a more ungainly garb, or more disfigured by an uncouth address. But in retracing his course we shall discover concealed beneath obvious defects of speech, and mien, and manner, the presence of those qualities which entitle their possessor to rank among the best and most able of our lawyers.

Lloyd Kenyon, second son of Lloyd Kenyon, by Jane, daughter of Robert Eddowes, of Eagle Hall, in Cheshire, was born at Greddington, in Flintshire, on the 5th of October, 1732. His father descended from an old Lancashire family, which had migrated into North Wales at the beginning of the century, lived independently on a small income as a country gentleman, and held that brevet rank which is conferred by a commission of the peace. Young Kenyon was sent early to Ruthin grammar-school, which retains a long established reputation of being one of the best classical foundations in the Principality. Here, however, the boy only staid long enough to acquire a little Latin, and no Greek. His father's fortunes did not permit his remaining a sufficient time to drink deep at the well of classical knowledge, for he had three brothers, and was not destined for any of those professions which were then thought to require a matured education. At the age of 14 he was articled to Mr. Tomlinson, an attorney in large practice at Nantwich, in Cheshire. In the office of this

gentleman he laboured assiduously seven years, and became so great a favourite from his shrewdness, diligence, and thrift, that he expected, at the expiration of his clerkship, to be admitted into partnership. Fortunately for the clever lawyer, and for the law itself, these expectations were not realized. The terms could not be arranged, and conscious that he was fitted for better things than the litigation, or conveyancing business, of a little provincial town, Kenyon determined to attempt the higher walk of the profession, and to venture on London. Accordingly in the summer of 1754 he took chambers in the Temple, and was matriculated at Lincoln's Inn. Thirty years afterwards he was unpleasantly reminded of Mr. Tomlinson and Nantwich by having to pass from his seat of justice in the Rolls Court into the witness box of the King's Bench to prove the execution of a deed, to which he had been an attesting witness.

The life of a student shut up with his books in a fourth story of Brick Court does not present many topics of personal detail. Thrown on his own resources, narrow and scanty as they were, Mr. Kenyon knew that he must be the artificer of his fortune, and applied himself with hearty good will to the task. To become a proficient in the science of the law was with him an absorbing passion—"his food, his sleep, his study, and his pastime." Like the venerable judge to whom we have before compared him, he had such a remarkable settled gravity and serious deportment, that even in the youthful part of his life he displayed but little of the youth. Against the coarser vices his correct moral principles proved an easy safeguard, and he had no relish or leisure for dissipation. Dancing appeared to him what Cyril Jackson termed it—"a roundabout way of reaching the bottom of the room;" could his finances have allowed a visit to the ballet he would, with Southey, "have hamstrung those fellows at the Opera;" to him the reading of *Paradise Lost* would have been, in the phrase of Fuseli, "a very tough job." Apollo and Littleton, says an old poet, seldom meet in the same brain, and it must be confessed, that however deeply imbued with the spirit of Coke on Littleton, the organ of imaginativeness was wanting. He tolerated occasionally, but could not enjoy, the drama. Thus in later days he dropped asleep amid the tumults of drum and trumpet at the first representation of Pizarro, and Sheridan was piqued

to exclaim, "Alas! poor man he fancies himself on the bench!" But in truth the lawyer felt drowsy, because his senses were far away, because he was *not* on the bench. To a young man of his staid temperament, the scantiness of his purse proved but a slight inconvenience, and he rated highly the habits of frugality and temperance with which it enforced compliance. Far from agreeing with the Roman satirist,

"Haud facile emergunt, quorum virtutibus obstat
Res angusta domi,"

which our great moralist has well rendered

"Slow rises worth by poverty deprest,"

he thought the reverse of this axiom more consistent with the truth, and that it was a serious disadvantage to a young man going to the bar, paradoxical as the remark might appear, to be sufficiently provided for. When asked by a rich friend as to the probable success of his son, he thus pithily gave the fruits of his experience, "Sir, let the young man forthwith spend his fortune, marry, and spend his wife's, and then he may be expected to apply with energy to his profession." In the same spirit Erskine spoke of his wife and children twitching at his gown, and constraining him to exertion; but with all deference to these great authorities, we dare not recommend any of our young friends to hazard the experiment, lest their nerves perchance should be shattered, and their strength of mind broken for ever, beneath the combined pressure of anxiety and privation.

Among the few fellow-students with whom Mr. Kenyon formed an intimacy, from their dining together in hall during term, were two young men of very different habits and dispositions from his own, but united by similarity of studies, and destined to play distinguished parts in after-life,—Dunning and Horne Tooke. "They used generally," says Steevens, "in vacation time to dine together at a small eating-house near Chancery Lane, where their meal was supplied to them at the charge of 7½*d.* a head." "Dunning and myself," added Tooke, when telling this to his friend Steevens, "were generous, for we gave the girl who waited on us a penny a piece, but Kenyon, who always knew the value of money, rewarded her with a halfpenny, and sometimes with a promise."

As he had no false pride, he was not ashamed in his days of greatness to allude to these humble meals, and point out the place where the ham and beef shop stood. With Tooke the companionship was of short continuance, for a man of his strict piety could not endure to shake hands with a latitudinarian both in religion and politics, but the intimacy between him and Dunning endured through adverse and good fortune to the last. That mercurial lawyer, with habits of application neither close nor systematic, enjoyed the happy gift of oratory which Mr. Kenyon wanted, and rose rapidly in name and fortune, while his more saturnine friend remained comparatively unknown. In the life of Murphy there is given an amusing instance of the way in which he loved to play with his petulance. When Mr. Kenyon came to the rooms of the new member for a frank, he directed it "North Wales, near Chester," an addition which so wounded the jealous spirit of the ancient Briton, that he threw down the envelope in wrath, and exclaimed, "Take back your frank, Sir, I'll have no more of them." Dunning interposed between him and the door, and soon pacified his choleric, but useful friend. He could not afford to part with an associate, whose diligence often supplied him with cases for which he might otherwise have searched in vain. He, in turn, supplied valuable memoranda of the arguments he had urged in banc, and the admirable judgments of Lord Mansfield. These our young lawyer carefully noted in his common-place book, and contrived to amass a large collection of MSS., which were in general more full and complete than the reports of Strange and Salkeld, and even Burrough, and to which he often referred with satisfaction in his decisions on the Bench. Mr. Kenyon was called to the bar in Hilary Term 1761, but the conversion of the student into an utter barrister was a change merely nominal. He had no professional connexion in London, and disdained to stoop to those petty artifices, by which, in the absence of interest, a business may be sometimes forced. Though year after year passed away without introducing more than an occasional client to his chambers, he studied as hard as if he had seen the large fees in present, and the judgeship in distant perspective, which at length so amply rewarded his labours. One line—a line fraught with instruction—includes

[illegible]

eventually prevail over adverse fortune and neglect. Several of Lord Kenyon's most distinguished colleagues had to struggle at starting with similar discouragements. Thurlow wasted in taverns the evenings for which the profession had no call; Grant bore a musket in Canada to relieve his vacant hours; and Scott travelled his northern circuit in the hopeless security of undisturbed leisure. But they neither gave way to despondency nor carelessness, and to the clouded dawn of each a bright day succeeded.

Mr. Kenyon had been twelve years in the profession, and had attained the mature age of 39, before he ventured on the important step of matrimony. The fact of his contemplating such an eventful change furnishes sufficient evidence of the increased entries in his fee-book; for on a person of his prudent and calculating character, no maxim of the political economy school was likely to be more binding than its favourite rule, that without an adequate fortune a man has no more right to take a wife than to set up a carriage. In 1773 he was married to his cousin Mary, third daughter of George Kenyon, of Peele, in Lancashire, a lady whose disposition accorded happily with his own, and with whom he led a long life of domestic comfort. By this union he had three sons, two of whom survived him, and to whom he bequeathed his accumulated gains and savings, a fortune of 300,000*l.*, besides conferring upon them during his life-time sinecure offices of considerable annual value. Each succeeding year, which brought its additional tribute to the amassing this ample fortune, proved that he had not commenced an establishment rashly. His name became familiar to those who had the conduct of causes, as a forcible, though not an elegant advocate, whom they might depend upon for being, in conventional phrase, always up to his points, and conversant with his brief. In 1779 he was retained as one of the counsel for Lord Pigot, in the state prosecution of Stratton and others for deposing him from his government. The trial, dull and uninteresting in itself, is distinguished by the perfect galaxy of counsel it included, all of whom were either ennobled or preferred to high station,—Wedderburne, afterwards Earl Rosslyn; Wallace, Attorney-General; Mansfield, in 1779 Chief Justice of the Common Pleas; Dunning, Lord As

ton ; Kenyon ; Arden, Lord Alvanley ; Wilson, in 1786 a judge of the Common Pleas ; and Erskine, Chancellor. A few months later we find Mr. Kenyon selected to be leading counsel for the eccentric Lord George Gordon, when the intolerant turbulence and fanatical fury of a mis-called Protestant mob had brought down on the head of their foolish leader a prosecution for high treason. The choice was not a happy one, for the clever equity draftsman wanted oratorical power, though he harangued the jury with much homely vigour. His junior, however, Mr. Erskine, amply atoned for his leader's deficiencies in the art of rhetoric ; and the appearance of the prisoner himself, standing at the bar with a large Bible spread open before him, from which he prayed permission to read four chapters of Zechariah, is said to have moved the jury to compassion. "I never yet," said Mr. Kenyon, "stood as counsel for a person who had so great a stake put in hazard. You are to separate one transaction from another, and to see how far each goes separately. You are not to bundle them together, and see whether this bundle of nothings can make out something. You must be cautious in a case of blood." A chance answer to one of his questions in cross-examining one of the principal witnesses for the prosecution, tended more to the acquittal of his client, than all his rough-shod arguments. It is a curious instance how successful the bullying system may sometimes prove in trepanning a jury. The witness had described one of the mob carrying a flag as a brewer's servant:—"he appeared to me like a brewer's servant in his best clothes."

"Q. How do you know a brewer's servant when he is in his best clothes from another man ?

A. It is out of my power to describe it better than I do : he appeared to me to be such.

Q. I ask you how, by what mark do you distinguish a brewer's servant from another man ?

A. There is something in a brewer's servant, in his condition different from other men.

Q. There may be, for what I know ; but tell me how you distinguish a brewer's servant from another man ?

A. Be so good as to state the question again.

Q. If there can be a doubt what the question means in

any one of this audience, you shall have it repeated. You said this man was like a brewer's servant. I asked you, by what mark you are able to distinguish a man to be a brewer's servant rather than of any other trade?

A. I think a brewer's servant's breeches, clothes and stockings have something very distinguishing.

Q. Tell me what in his breeches, and the cut of his coat and stockings it was by which you distinguished him?

A. I cannot swear to any particular mark."

The poor man, too much bewildered to explain his meaning, though very easy of explanation, was hooted from the box as if he had sought to impose on the jury, and Erskine, in his able address, dexterously confirmed their suspicions, that a perjured story had been wonderfully detected. "You see, he remarked, "by what strange means villany is discovered; perhaps he might have escaped from me, but he sunk under that shrewdness and sagacity which ability without long habits does not provide. Gentlemen, you will not, I am sure, forget whenever you see a man about whose apparel there is any thing particular, to set him down for a brewer's servant." This delicate compliment to his superior skill must have afforded great pleasure to Mr. Kenyon, for even the hardest natures are soothed by adroit flattery, and led, no doubt, to that friendly feeling, amounting in later days to a kind of paternal regard, with which he viewed such a courteous junior. His name had now become common in the mouths of men, and on the arrival of those halcyon days to the leaders of the profession,—times of trouble to the state, and change in the cabinet,—on the accession to power of the Fox and Rockingham administration in April, 1782, he was appointed Attorney-General in the room of Wallace. The surprise at his promotion is said to have been the more general from his not having previously filled the office of Solicitor. Mr. Kenyon had never taken any part in politics, and certainly could not be accused with truth of being a Foxite; but whether he owed his appointment to professional merits, or to the friendship of his powerful patrons, Lords Thurlow and Ashburton, the choice did the ministry honour. The Chancellor at the same time nominated him Chief Justice of Chester, a union of characters, which however objectionable

in principle, has been frequently made by successive administrations. There passed some notes relative to this appointment, which contain beautiful specimens of the Spartan. Serjeant Davenport, wishing to chime in with Lord Thurlow's humour, wrote the pithy question, "The Chief Justiceship of Chester is vacant, am I to have it?" The reply was equally short and to the point, "No, by G—d, Kenyon shall have it."

The new Attorney-General appeared to entertain as little notion of official intrigue, or ministerial subordination, as if he had been a back woodsman newly caught. Having been elected into parliament by a close borough, he commenced his career against public accountants with such violence as to fill the Treasury bench with consternation, and elicit a friendly caution from Fox. When Lord John Cavendish, then Chancellor of the Exchequer, moved a resolution prohibiting officers from making any use of the public money in their hands for their own advantage, he declared "he did not mean to oppose the resolution, but at the same time he would not have it understood that he precluded himself in the smallest degree from a full right and liberty to have discussed in a court of justice the question, whether the public might not call upon the great servants of the public to account for the great emoluments they had made by means of the public money. He did not mean to give any opinion on the subject himself, but he was determined to be at liberty to have it discussed before a proper tribunal, if such a discussion should appear to him necessary. He spoke not from any ill-will to any man alive, but solely from a sense of duty in an office which he had been unexpectedly, as he was undeservedly, called to fill. He did not know how long he might remain in it, but if he should be dismissed from it he should return to much domestic happiness, which he had enjoyed before he had been called into public life, but while he remained in it he was determined to do his duty." The introduction of these topics proved not less invidious than unfortunate to his colleagues.

It was urged triumphantly, "why should the executors of Lord Holland have many years to pay in his balances; and gentlemen made no secret of their having come down to the House from curiosity to hear how the Right Honourable

Secretary (Mr. Fox) would behave in a cause in which he was so greatly concerned. There certainly had not been, within the memory of the father of the House, so intractable an Attorney-General, whose stubborn independence of ministers contrasted strongly with the rough thorough-going partisanship of Thurlow, and the servile suppliancy of Wedderburne. He moved six resolutions; and even when his four first had been agreed to, this pertinacious law officer of the Crown (not the servant of the ministry), withdrew the two last obnoxious resolutions, but moved with a determined honesty as if butting down his colleagues—"That leave be given to bring in a bill to direct the payment into the Exchequer of the respective balances remaining in the hands of the Right Honourable Richard Rigby, late Paymaster-General of his Majesty's forces, and of the Right Honourable Welborne Ellis, late Treasurer of his Majesty's Navv. for the use and benefit of the public, and for indemnifying them in respect of such payments, and against all future claims relating thereto." The result might have been foreseen. The supporters of the late government, aided by the personal friends of two influential statesmen, divided 127 to 116, and left the new ministry, as yet scarcely settled on the Treasury bench, in a mortifying minority.

When on the death of the Marquis of Rockingham, and subsequent change in the premiership, Mr. Fox and a portion of the cabinet withdrew, Mr. Kenyon retained his office with Pitt as Chancellor of the Exchequer, and went out with the Shelburne administration in the spring of the following year. In December again, when the India Bill had wrecked the unfortunate coalition, he was re-appointed Attorney-General, having, while the ministerial changes were in progress, asserted his perfect independence. "He was not," he said, "in the secrets of those who were just gone out, or of those who were coming in, and therefore he did not know what measures were likely to be adopted; he did not know whether the Parliament would be dissolved or not, and, if it should, he did not know that he should have a seat in the next House of Commons, nor indeed did he wish it; but let what would happen on that head, he would vote according to his conscience." After the recess the Attorney-General moved, for the second

time, "that the Right Honourable Richard Rigby, late Paymaster-General of the Forces, do deliver to this House an account of the balance of all public money remaining in his hands on the 18th and 19th days of November last," stating, as a justification of his perseverance, "that the obligation of the oath he took when he was sworn into office compelled him to see that, as far as in him lay, all the money belonging to the public should be paid into the Exchequer with as little delay as possible."

Mr. Rigby declaimed with great vehemence against this harsh proceeding, complaining that he had not received that civility which was generally shown between man and man, and appealed to the House if any one in his situation had ever met with such treatment from an Attorney-General. This prodigious obligation upon oath, "he remarked sarcastically, which galled the learned gentleman so much, was never felt to such a degree by the most able, honourable, and learned of his predecessors. Lords Camden, Thurlow, Loughborough, and the late Mr. Wallace, whose characters, he hoped, he might venture to oppose to that of the learned gentleman, never felt that the duty of their oath called for such a mode of proceeding as was that of the learned gentleman."

Mr. Rigby was at length driven, at much personal inconvenience, to furnish a clear debtor and creditor account with the public. With less success, but with equal zeal, to effect useful reforms, Mr. Kenyon introduced a bill, which passed through a committee of the House, to limit a Writ of Right to thirty years. Mr. Shadwell renewed the bill, under better auspices, in 1827, when, as he said, a greater spirit of inquiry and research was abroad, and a spirit of reform in all useful matters cultivated by all classes of persons. Mr. Pitt about this period, 1784, conferred on the Attorney-General, whose legal acquirements he held in the highest esteem, the dignified office of Master of the Rolls, with a *baronetcy*. In the zeal of political friendship, Sir Lloyd Kenyon recommended the Premier to insist on the notorious Westminster scrutiny—a measure which signally failed in its presumed object, the discomfiture and disgrace of a formidable rival. In the ever-memorable speech which Fox delivered on this occasion, complaining of his wrongs, and taking exception to many of his

judges, he inflicted a grave rebuke and signal chastisement on the zealous partizanship of his former colleague. "A third person there is," he said, "whom I might in reason challenge—a person of a sober demeanour, who with great diligence and exertion in a very respectable and learned profession, has raised himself to considerable eminence—a person who fills one of the first seats of justice in this kingdom, and who has long discharged the functions of a judge in an inferior but very honourable situation. This person, Sir, has to-day professed and paraded much upon the impartiality with which he should discharge his conscience in his judicial capacity as a member of Parliament in my case. Yet this very person, insensible to the rank he maintains, or should maintain in this country, abandoning the gravity of his character as a member of the senate, and losing sight of the sanctity of his station both in this House and out of it, even in the very act of delivering a judicial sentence, descends to minute and mean allusions to former politics, comes here stored with the intrigues of past times, and instead of the venerable language of a good judge and great lawyer, attempts to entertain the House by quoting, or by mis-quoting, words supposed to have been spoken by me in the heat of former debates and the violence of contending parties, when my noble friend and I opposed each other. This demure gentleman, Sir, this great lawyer, this judge of law and equity and the constitution, enlightens this subject, delights and instructs his hearers by reviving the interesting intelligence, that when I had the honour of first sitting in this House for Midhurst, I was not full twenty-one years of age; and all this he does for the honourable purpose of sanctifying the High Bailiff of Westminster, and defrauding the electors of their representation in this House. Against him therefore, Sir, and against men like him, I may justly object as a judge or as judges to try my cause."

Not content with this dignified censure, the devoted followers of Fox embalmed the transgressions of the Master of the Rolls in the most celebrated political satire in our language, the "Criticism on the Rolliad." Originally naming their work after Mr. Rolle, the (to them) obnoxious member for Devon, they appear to have been induced, by the similarity of name,

to add what they term a poetico-prosaical dedication to Sir Lloyd Kenyon. The title-page is adorned with a crest, the half-length of the Master of the Rolls, like a lion demi-rampant, with a roll of parchment instead of a Pheon's head between his paws. The likeness, we may be sure, was not a flattering one, nor so gratifying to his lady as the sketch that was taken by the boy Lawrence. It showed the rough, hard, coarse features—the broad face ‘distinguished from vulgar ovals—the pert, no-meaning, puckering round the eye’—the clownish cast of countenance. After praising him for voting at the Westminster election as the delegate of his coach-horses, (he lived in Lincoln's Inn Fields, but voted in right of some stables,) the wits of that delightful miscellany sum up his parliamentary misdeeds in the following elegant satire:—

“How shall the neighing kind thy deeds requite,
Great Yahoo champion of the Hounhuhm's right?
On! may they, gently pacing o'er the stones,
With no rude shock annoy thy battered bones;
But when a statesman in St. Stephen's walls,
Thy country claims thee, and the Treasury calls,
To pour thy splendid bile in bitter tide
On hardened sinners who with Fox divide,
Then may they, rattling on in jumbling trot,
With rage and jolting make thee doubly hot,
Fire thy Welch blood, inflamed with zeal and leeks,
And kindle the red terrors of thy cheeks,
Till all thy gathered wrath in furious fit
On Rigby bursts—unless he votes with Pitt.”

The pain which Sir Lloyd Kenyon must have felt from this and similar quips, for he appears to have been remarkably sensitive to obloquy, was ere long soothed by the precious balm of promotion. The retirement of Lord Mansfield, long ardently anticipated, at length made a vacancy, which Mr. Pitt determined to fill with the nomination of his able parliamentary ally. During the four years of his presiding over the Rolls Court, he had comparatively withdrawn himself from public notice. Though fully master of all the cases submitted to his decision, his decrees were sometimes overruled, from an obstinate adherence to the rigid rules of law and to precedents, in opposition to the principles of more

liberal and modern construction. But this important appointment—the most durable and one of the most dignified in the law, brought his merits and defects into general discussion; and it must be confessed, that the voice of the profession and the public proclaimed loud dissatisfaction with the choice. But an impartial posterity will admire the discriminating judgment of the Minister; for while the causes of popular odium have passed away, his judgments are stamped indelibly in the laws of his country. That he should have been unpopular can excite no surprise in those who remember the demeanour of the man. In May, 1788, Sir Lloyd Kenyon was gazetted—Lord Kenyon, Baron of Greddington, and plumped down, if we may suit the word to the action, into the chief seat of the King's Bench, with little ceremonial observance of his colleagues, to whom he displayed a blunt, disregarding, almost cynical manner, the more marked from its contrast to the courteous dignity of Mansfield, and the grave, majestic bearing of Buller. The supercilious reception, says Espinasse, an eye-witness, which he gave to the opinions of the other judges, was not that merely of neglect, it bordered on contempt. He predominated over them with high ascendancy. They very rarely differed from him; if they did, their opinions were received with a coldness which stooped not to reply, or, if noticed, were accompanied with angry observation. He was irritated by contradiction, and impatient even of an expression of doubt of the infallible rectitude of what he had delivered as his judgment. In differing with his predecessors he used no soft or measured language. Having occasion to contravene a dictum of Chief Justice Holt, he wondered that so great a judge should have descended to petty quibbles to overturn law and justice; and when a saying of Lord Mansfield was cited, that if a man had insured to the amount of 2000*l.*, and had interest on board to the value of a cable only, that would do, he declared that this was very loose talking, and should not be ratified by him. When a new trial was moved for against a ruling of his own, on the ground of mis-direction, he would scarcely give time to his colleagues to deliberate together, but at once blurted forth his judgment. "If the rest of the Court entertain any doubt the case may be further considered, but

I am bound to give the same opinion I formerly gave, not because I gave that opinion before, but because I am convinced by the reasoning that led to it." Whenever his brother judges ventured to differ from and overrule his decisions, (there were only half-a-dozen cases in the course of fourteen years which called for this exhibition of fortitude,) his manner evinced as much testiness as if he had received a personal affront. Thus, in the well known case of *Haycraft v. Creasy*, 2 East, p. 99, in which the defendant had told the plaintiff he knew, of his own knowledge, a certain lady was a woman of fortune, by which false representation the plaintiff was induced to trust her to a large extent, his colleagues thought the action could not be maintained, as there was no *mala fides*, no fraudulent misrepresentation. Lord Kenyon urged the contrary, with all the heat and passion of an advocate. "The Attorney-General has stated this case trenched on the statute of frauds; he would only shortly reply, he thought it had nothing to do with it. If the present action could not be supported, he had now for twelve years been deceiving the people of this country. Was he now, when from years, perhaps, the progress of his intellect had been retrograde, to unsay it? Where could he go to hide his head, if this should now be recorded otherwise? What could he say to the people of this country? This was the ground he went on. Did the defendant affirm that which he did not know to be true? This he considered sufficient evidence to support the declaration of fraud. It might not, perhaps, amount to moral turpitude, but it was, in his opinion, sufficient to constitute legal fraud." Grose, Lawrence, and Le Blanc, *Js.*, on the other hand, thought the man a dupe, and not fraudulent. When they had finished, he exclaimed, "Good God! what injustice have I hitherto been doing!" It was visible to every person in Court, that this ejaculation was not uttered in the penitent voice of regret for any injustice which he might involuntarily have done from a mistake of the law, but in the querulous tone of disappointed pride, from finding that the other judges had presumed to think for themselves, and to question the supremacy of his opinion.

To those that were "in authority under him," the barristers of his Court, the manner of Lord Kenyon is reported to have

been equally ungracious. If a word or a sentence escaped from a counsel not quite in accordance with his sentiments, his temper blazed into a flame which could not be got under even by humility. On these occasions he gave loose to an unchecked effusion of intemperate expression, and his language was not at all times chastened by the strict rule of good breeding. He petted, indeed, some few favourites, Erskine in particular, who now and then succeeded in catching a stray smile from the rugged chief. At him he would occasionally shake his head in good humour, when disapproving of some argument in banc, "It won't do, Mr. Erskine, it won't do!" But even he could not venture too far, or sleep with impunity, for the well-meaning Bruin, as in the fable, would soon have scratched his face in the excess of his vigilant zeal. To Law and other leaders, against whom he might have imbibed a casual aversion, his manner is confessed to have been singularly offensive. On this obnoxious King's Counsel moving for a new trial unsuccessfully, Lord Kenyon could not refrain from the sneer, "Well, Sir, you have aired your brief once more!" While thus offensive to several of those more advanced in the profession, he could not claim, as a set off, the merit of being gracious and encouraging to the junior portion of the bar. An irregular application, we are told, though it proceeded from inexperience only, was received without the indulgence that was due to it; if made by the more experienced, it was refused with contumely. He had a kind of phosphoric temper, which was ignited by the most trifling circumstance, and sometimes came in collision with spirits as ardent as his own. Clifford, in particular, who some years afterwards figured as leader in the O. P. riots, taking a prominent station in the pit, in all the paraphernalia of band and wig and gown, delighted too much in tumults to quail before the terrors of this "Jupiter Hostis." The following scene is characteristic of the Chief in his troubled mood; we remember a cotemporary mimicking his Welch intonation, which in anger was particularly distinguishable, with great effect. Mr. Clifford made his application with as much non-chalance as if he had been moving for a rule of course:—

"I humbly move your Lordship for a writ of habeas

corpus, to be directed to the keeper of Newgate, commanding him to bring into court the body of Benjamin Flower. I move it on a very full affidavit, made by Mr. Flower, which states—

Lord Kenyon. ‘Is not Mr. Flower committed by the House of Lords for a breach of privilege?’

Mr. Clifford. ‘Yes, for a libel and breach of privilege.’

Lord Kenyon. ‘Then you know very well, Mr. Clifford, you cannot succeed. This is an attempt which, for the last half century, has been made every seven or eight years; it regularly comes in rotation, but the attempt has always failed. You do not expect to succeed.’

Mr. Clifford. ‘My Lord, I do expect to succeed. I should not make this application unless I knew I could support it. The affidavit states, that on the second of May last, Mr. Flower was taken into custody at Cambridge for a supposed libel on the Bishop of Llandaff, published there; that he was carried before the House of Lords, that he was ordered to withdraw, and was afterwards conducted to Newgate. The affidavit also states, that he is not conscious of having published any libel on the Bishop of Llandaff, or on any other person; that he has not been put upon his defence, nor been tried or convicted of any libel or other offence.’

Lord Kenyon. ‘Does he swear that it is not a libel on the Bishop of Llandaff?’

Mr. Clifford. ‘He swears that he is not conscious that it is a libel.’

Lord Kenyon. ‘Another part of his affidavit is also false, that he was not put upon his defence. I happened to be one of his judges. I was in the House of Lords at the time, and heard him make a very long defence. File your affidavit, Sir, that your client may be prosecuted. You shall take nothing by your motion.’

Mr. Clifford. ‘I certainly intend to file my affidavit.’ ”

After some further sharp controversy, Lord Kenyon said, “ ‘If you will have it, take your writ. It will be of no use to you. You move it merely by way of experiment, and without any view to benefit your client. I am very sure of that.’

Mr. Clifford. ‘I do not.’

Lord Kenyon. ‘You know it cannot benefit him. It is like

the case of Alexander Murray, where two gentlemen, who had not been at the bar for forty years before, put on their wigs and gowns to resist what they conceived to be an encroachment on the liberty of the subject. The consequence was, that their client was sent back to prison, and they returned home as they came, and never appeared again in the profession.'

Mr. Clifford. 'The case of Alexander Murray is very different. It was the case of a contempt committed in the House of Commons.'

Lord Kenyon. 'No, Sir! it was for a contempt committed out of the House.'

Mr. Clifford. 'It was for a contempt committed in the House. He was originally brought before the House for his conduct in the Westminster election, but the contempt for which he was committed was, the refusing to kneel at the Bar when ordered by the House.' "

The sparring match ceased here, and five days afterwards the keeper of Newgate attended with Mr. Flower. After the return to the writ had been read, Mr. Clifford proceeded to argue that Flower was entitled to his discharge, and prefaced his argument thus: "My Lord, when in the strict and regular discharge of my professional duty I moved for a writ last Thursday, I little thought that I should now appear before your Lordship in a twofold capacity, first as counsel for Mr. Flower, and secondly, as a delinquent having a common cause with him, and complaining of your Lordship for having adjudged me guilty of a contempt of Court, in the same manner as Mr. Flower complains of the House of Lords, *videlicet*, without a trial, without evidence, and without defence. Upon that occasion, your Lordship thought proper to assert that I made the motion merely as an experiment, contrary to my own opinion, and without any view of benefiting my client. If this be true, I am most undoubtedly guilty of a gross insult to your Lordship, and of a high contempt of Court, such as called for the severest reprehension. But I then told your Lordship what I now repeat, that I should not have moved for the writ unless I could have supported it in point of law. I then thought I could, and the more I have reflected on the subject since, the more am I convinced that

I can support it by unanswerable legal arguments; but, although your Lordship made this charge, you did not think proper to state the grounds on which you made it. Of this I have reason to complain. I do not know what right your Lordship has, without just foundation, to impute such unworthy motives to me—what your Lordship sees in me—what there is in my conduct or behaviour—what has appeared in my practice in this Court, that can warrant your Lordship in casting so groundless an aspersion on my character. So much for myself.” He then drew a fancy portrait of a prime minister, who might degrade the House of Lords by inundating it with a crowd of low-born persons devoid of talents or respectability, and with no pretensions but their venality to the peerage, thus out-numbering and weighing down the ancient and hereditary nobles of the land, and rendering them mere ciphers in the state. The intemperate zeal of counsel was met, unfortunately, with equal intemperance from the bench. It was a sort of shuttlecock play of sarcasm and innuendo, which the judge compromised his dignity in keeping up.

“The learned counsel,” said Lord Kenyon, “who has looked round on every side during his address to the Court, has drawn a picture of a minister established in power by the voice of the people, and then doing a great many horrid things, and among others, filling the House of Lords with a banditti. The learned counsel, it is true, did not use that word, but persons who superseded the ancient nobility of the country. I happen to be one of that number. Of myself I will say nothing, but of the rest I will say a word or two. If we look to the history of the country, and consider who were made peers in former times, and who now form part of what he calls the hereditary nobility of the country, if we look back to the reign of Charles the Second, in the letters which form the word Cabal, will the memory of the learned counsel, who seems to think virtues and vices hereditary, furnish him with the name of no person who was not very likely to devolve virtues to the succeeding ages. But no more of that. From what has passed, I am called upon to vindicate the honour of the House of Lords. Their honour stands upon so stable a ground, that no flirting of any individual can hurt them.” Mr.

Flower was remanded to Newgate, and Clifford revenged himself in a pamphlet, in which he remarks, "We seldom observe, in our hereditary peers, those pedantic notions of impracticable morality, or that boisterous impetuosity of manners, which sometimes accompany and disgrace, even in the highest situations, those who have been raised to them from the desk, merely on account of their industry and professional success." He quotes, with some felicity, a saying of his ancestor, Sir Thomas Clifford, in reprobation of Sir John Kelyng, the then Chief Justice of the King's Bench, who had committed him—"the foolishness of the man in doing it, the passion, the choler—these were his crimes."

As a companion to this sketch of a somewhat indecorous exhibition in the King's Bench, it may not be uninteresting to present a few scenes from another trial, in which Lord Kenyon measured weapons with his former fellow-student,¹ the litigation-loving Horne Tooke, and which is highly characteristic of the testy chief. His firm spirit, though murmuring and re-calcitrant, appears to have quailed on this occasion before the more intrepid assurance of the defendant. It is the case of *Fox v. Horne Tooke*.

Erskine stated, that this action of debt was brought in consequence of a certain act of parliament; and, as he knew that Horne Tooke panted for an opportunity of making a speech, with much tact, abstained from one himself, observing simply: "This act does not entitle us to enter into a discussion of the merits of any matter, or thing relating to them, and I therefore shall certainly say nothing on this case, but merely put

¹ In "*Peerage for the People*," the anecdote which Steevens relates of Horne Tooke, Dunning, and Kenyon, is thus amusingly travestied: "Kenyon, Law, and John Scott, now Earl of Eldon, and the only survivor of the three, used frequently to dine together at an ordinary which we believe is still kept at Bedford Street, in the Strand. The repast of the party was frugal, while they cooled their thirst, not with the waters of Helicon, but with the water of the river Thames. The average amount of each man's bill was about 10d. or 10½d., but it never exceeded a shilling even in the instance of Law, who was the most expensive of the three. The late Lord Erskine used to say that Kenyon invariably bilked the waiter—Scott sometimes gave her a halfpenny, while Law always came with his penny-piece." The whole of this story is pure fiction with respect to the *dramatis personæ*; Kenyon had married, and ceased to dine at ordinaries before either Law or Scott had quitted their respective universities. The parties were not even acquainted with each other when young men. Alas! for the authenticity of anecdote.

in the evidence that is necessary for Mr. Fox to maintain his action." He proved the amount from the Speaker's warrant, his signature, and the vote from an examined copy of the Journals of the House. Upon this, Lord Kenyon exclaimed, in his short dry way, "Is there any defence?" Mr. Tooke coolly took a pinch of snuff, and commenced a speech of nearly two hours, with informing the jury "that there were only three efficient and necessary parties—the plaintiff himself, the defendant, and you, gentlemen of the jury. The judge and the crier of the court, attend alike in their respective situations, and they are paid by us for their attendance; we pay them well: they are hired to be the assistants and reporters, but they are not, and they never were intended to be, the controllers of our conduct." Mr. Tooke was proceeding to give a history of the election of 1788, and its ruinous expense,—that Lords of the Treasury were expected to pay £200 each: persons in superior situations £300, when Lord Kenyon interrupted him. "Mr. Horne Tooke, I cannot sit in this place to hear great names and persons in high situations calumniated and vilified; persons who are not in this cause; persons who are absent, and who cannot defend themselves. A court of justice is not a place for calumny, it can answer no purpose; you must see the impropriety of it; and it does not become the feelings of an honourable man."

Defendant. "Sir, if you please, we will settle this question between us now in the outset, that I may not be liable to any more interruptions from you."

Lord Kenyon. "Lord Lovat produced the names of persons of great respectability, and he was stopped in the House of Lords. It was said it was indecent to do it, and that it became a man of his station to refrain from such things."

Defendant. "I am persuaded I shall be able, very easily and very shortly, to satisfy you that I am not in the wrong path, and it is the more necessary that I should do so now, because it is the path which I most certainly mean to pursue, and will not be diverted from. You know, at least you ought to know, and I acknowledge, that if, under the pretence of a defence in this cause, I say under the pretence of a defence, I shall wantonly and maliciously say or do any word or thing which would be punishable by the laws of the land, if said or

done by me wantonly and maliciously anywhere else, in the street upon any other or no occasion gratis, I shall be equally liable to prosecution and punishment by the same laws, and in the same manner, for what I shall say or do here. But, Sir, you have made use of some words, which I am willing to believe you used in a manner different from their usual acceptance. You spoke of calumniating and vilifying; those words usually include the notion of falsehood. Now I imagine you did not mean them so to be understood, or to insinuate by them your evidence to the jury that I had said what was false, but that by calumny you only meant things injurious to the characters of the persons spoken of, such things as would hurt them to hear, whether true or false."

Lord Kenyon. "Certainly."

Defendant. "Well, I thought so; and you see I was not desirous to take advantage of the words to impute to you any other meaning or intention: because, had you meant otherwise, and included the notion of falsehood in the word calumny, your Lordship would then have calumniated me. For I have spoken nothing but the truth, as I believe you know, and which I am able and willing to prove. In one thing which has fallen from you I go farther, and am stricter than you are. I think it hard that any persons, either in a cause or out of a cause, should at any time unnecessarily hear what is unpleasant to them, though true. I mean to do nothing of the kind. At my peril I shall proceed, and expect to meet with no farther interruption from your Lordship."—

He did not.

Mr. Tooke then proceeded to lay before the jury what he dearly loved—a startling and patent paradox. "I do not believe the dependance of the judges on the crown was so great formerly as at present. I believe the judges then were less dependant on the crown and more dependant on the people than they are at this hour. The judges then sat on the bench, knowing they might be turned down again to plead as common advocates at the bar, and indeed it was no unusual things in those days to see a counsel at the bar brow-beaten and bullied by a chief justice on the bench, who in a short time after was to change places with the counsel and to receive himself the same treatment from the other in

his turn; and character and reputation were of more consequence to the judges then than they are now. They are now completely and for ever independent of the people, and have every thing to hope for for themselves and families from the crown." Mr. Tooke then sneered at the profession from which he was himself excluded; remarking, with the benevolent object of mortifying the Chief Justice, that the brilliant apprenticeship to a peerage was to carry a bag in Westminster Hall; and that the observation of some particular individual being suddenly flush of money, who was never known to have any before, has led to a certain detection of the thief. He then told a long story of a prosecution of his against some rioters in the Westminster election being dismissed for want of a prosecutor, his counsel not having entered court till soon after nine, when Mr. Garrow interposed, and related the real facts. Mr. Tooke continued, with his usual cool assurance, "There can be no doubt at all but that your Lordship will always find some one in your own Court willing and ready to get up and recommend himself to your favour by a speech in your defence, and I should have been much surprised if it had not been the case now. I am not sorry for it, for Mr. Garrow has given me time to breathe a little" Lord Kenyon exclaimed angrily, "I want no defence. What has been said against me rather deserves my compassion. I do not carry about me any recollection of it, or any of its circumstances." The defendant resumed with a sardonic smile, the only approach to merriment he ever allowed himself: "I cannot say that I *carry about me* any thing in consequence of it. I carry about me something less by all the money which it took out of my pocket. Mr. Garrow has risen up to interrupt me and to deny the fact. Most certainly the fact did pass as I have stated it. I heard him with much pleasure, for I wanted breath. When we have a very different House of Commons from the present, which will consist of the real representatives of the people, of whom, if I shall happen to be one, I pledge myself now, that I will in my place in such House, call you to a proper account, my Lord, for your conduct that day, and Mr. Garrow may reserve his justification and defence of your Lordship's conduct till that time, when you will want it." With this threat and a strong injunction to the

jury that they must "well and truly try" the cause, Tooke sat down. Lord Kenyon summed up with contemptuous brevity. "Gentlemen, you are bound by your oath, well and truly to try this cause as stated on the record, and the question in issue between the parties is this: Whether, by the law of the land, the defendant is bound to the plaintiff in this cause in the sum of 198*l.* 2*s.* 2*d.* If a man refuse to pay the costs of a petition, voted frivolous and vexatious, when taxed as directed by the act, he may be brought before a court of justice. If you are satisfied on your oaths that this has been done on this occasion, then you will well and truly have tried this cause by finding a verdict for the plaintiff." The jury so found, but only after an interval of four hours and twenty minutes.

In these skirmishes of carte and tierce, the Chief Justice encountered hardy men, who loved the sport, had rather the best of the fray, and sustained no injustice. A more numerous class, however, suffered beneath his asperities without an opportunity of retaliation or reply. Indignant at the sharp practice, to which some prowling attornies in the Bail Court, or at the Old Bailey, might be prone, he extended to the whole body that angry suspicion which should have been restricted with a guarded discretion to the cases of delinquent individuals, and involved a liberal profession, comprehending all varieties of character, in a sweeping and indiscriminate censure. His jealousy was ever on the watch. When a naval officer had been arrested at a ball, Lord Kenyon said, if he could be sure that the attorney had done this for the purpose of insulting him, he was not certain that he ought to remain on the rolls of the Court. The attorney for the prosecution having sent a written paper to the grand jury stating the law on a case concerning which they were assembled to find or reject the bill, a proceeding not without precedent, and which only showed excess of zeal; the Chief Justice recommended an indictment to be preferred against him. In other cases this severity found surer ground to rest on, and wrought much good. That he might put an end to sham pleas, he commanded the attornies to attend and state to the Court their reasons for giving such instructions. One morning when none of the parties were ready at Guildhall, he earnestly recom-

mended the several clients to bring actions against their professional advisers; and on trying the next insurance case, entreated the merchants not to stand so much on sea worthiness. He was very sorry such conundrums were started, because he was sure they would meet with nursing fathers and nursing mothers. When some paltry trial on a wager had been concluded, he turned sternly to the plaintiff's attorney, "Do not bring me actions on bets, sir, but look out for more reputable business." "His hatred of dishonest practices," says the author of *My Contemporaries*, "had lit up a flame of indignation in his breast, but it was an ignis fatuus which led him into error. He gave too easy credit to accusation, and formed an opinion before he suffered his judgment to cool. He decided when under the influence of a heated temper, and often punished with unreflecting severity. The effect of this intemperate mode of administering justice, my memory recalls with painful recollection in the case of a Mr. Lawless, an attorney, and an honourable member of that profession. He was involved in the general and groundless prescription of the day. Complaint was made to the Court against him for some imputed misconduct, grounded on an affidavit, which the event proved was a mass of falsehood and misrepresentation; but it being on oath, and the charges serious, it was thought sufficient to entitle the party applying to a rule to show cause why Mr. Lawless should not answer the matters of the affidavit. He could have no opportunity of answering them till he was served with the rule, and had obtained copies of the affidavits on which it was granted. Natural justice would point out, and the practice of the Court was conformable to it, that he should be heard in answer to them before he was convicted. For that purpose a day is given by the rule on which the party is to show cause, during which time every thing is considered as suspended. This indulgence was refused to Mr. Lawless, though the rule was obtained on an *ex parte* statement before any opportunity was afforded him to answer the charges, or to be heard in his defence. Lord Kenyon, in addition to the common form of the Court's assent to the application, which is in these words addressed to the counsel: 'Take a rule to show cause;' added, 'And let Mr. Lawless be suspended from practising until the rule is disposed of. He

happened to be present in Court when this unexampled judgment was pronounced, and heard the sentence which led to his ruin ; he rose in a state of most bitter agitation, ‘ My Lord, I entreat you to recall that judgment, the charge is wholly unfounded ; suspension will lead to my ruin ; I have eighty causes now in my office.’ What was Lord Kenyon’s reply to this supplicatory appeal to him ! ‘ So much the worse for your clients, who have employed such a man ! You shall remain suspended until the Court decides on the rule.’ The rule came on to be heard at a future day after the affidavits on the part of Mr. Lawless had been filed. The charges against him were found to be wholly without foundation, and the rule was accordingly discharged. Mr. Lawless was in consequence restored to his profession, but not to his character or peace of mind. He sunk under the unmerited disgrace, and died of a broken heart.”

We suspect that there is some exaggeration in this narrative, but even after making every allowance for a highly-coloured statement, we see great reason to regret such unguarded precipitancy, and cannot wonder that a judge so irritable and hasty should have been unpopular within the pale of the profession. But however much the deficiency of a calm and courteous bearing impaired his reputation among the practitioners in his Court, and rendered him less acceptable to his yoke-fellows on the bench, never was judge in higher fame with gentleman of the press, and gentlemen of the jury. His very failings won their liking, his prejudices were theirs : they, with him, loved to detect some knavish trick in an attorney ; with him they held in pious horror the fashionable vices of the great, and the faults in his addresses against taste and correct idiom, were beauties in their ears. His reverence for the trial by jury bordered on idolatry : his sentiments never rose very far above the dead level of theirs. They went with him heartily in his addresses, and perhaps the annals of *nisi prius* can furnish no example of a judge so invariably winning the verdict of a jury. His small shot always told : he never fired above their heads ; but, to borrow a favourite saying of his own, “ hit the bird in the eye.” In actions for criminal conversation, for instance, on the enormity of which the exemplary judge felt strongly, their feelings were kindled by his

summing up into a contagious fever which inflamed the verdicts, to sums of £10,000 and £5,000. Even in such flagrant cases as those of *Lord Valentia v. Gawler* and *Duberley v. Gunning*, both of which disclosed circumstances of manifest and disgraceful collusion, the jurors lavished compensation by thousands, where nominal damages would have been more than sufficient. Lord Kenyon stood prominently forward as a censor morum, a guardian of the morals no less than the laws of this country, whose especial duty it was to lash the fashionable vices of the day, and punish the delinquencies of the great. "I had not been long in a Court of justice," he observed, in the melancholy case of *Howard v. Bingham*, "before I felt I should best discharge my duty to the public by making the law of the land subservient to the laws of religion and morality; and therefore in various cases that have come before me, when I saw a considerable degree of guilt, I have pressed the judgment of juries to go along with me in enforcing the sanctions of religion and morality by the heavy penalties of the law, and I have found juries co-operate with me in trying how far the immorality of a libertine age would be corrected, by letting all parties know that they best consult their own interests by discharging those duties they owed to God and society." The number of actions for the breach of these duties increased in a manner that proved rather the cupidity of individuals, than the profligacy of general manners, and tended only to incite the indignant Chief Justice to more strenuous exertions. His endeavours, he confessed after an experience of some years, to deter men from the enormous crime of adultery, had proved ineffectual hitherto. But judges and juries were appointed to redress private and public wrongs: they were the guardians of the morals of the people, and ought never to relax in their efforts to prevent the commission of crimes which struck at the root of private happiness, of religion, and the well being of society. In his usual peroration he insisted on the probability that the defendant was able to pay large damages; but if he was not, would they, the guardians of the public, suffer the adulterer to go free? He advised the jury to give ample damages, not for the sake of putting their hands deep in defendants' pockets, but that the vice might be suppressed. The country looked up to them.

The twelve delighted guardians responded in general with such alacrity to the call thus made upon their patriotism, that according to honest Mingay they not only put their hands, but common sense, in their breeches' pockets. Once when they demurred because the lady painted, Lord Kenyon told them "they should not mind that—that was common. Besides, the defendant (General Gunning) was an abominable, hoary, degraded creature." In the excess of his moral zeal, he overstepped the principles of law on which this action is founded, laying it down as a general rule that two things were to be attended to; first, to give a satisfaction to the party injured, as far as money can be any satisfaction for such an injury; and secondly (here lay the error), that it ought not to slip out of the minds of juries in administering justice, that they ought to set some example to the public which might be conducive to public virtue. "There was a time," he added, "in the history of this country, when the laws of the Puritans, which were mixed with a great deal of virtue, if I mistake not, subjected this offence to the punishment of death. I do not look forward to a punishment so severe; but I wish some personal punishment were attached to those who inflict so dreadful, so incurable a wound on the peace of private families." Against the legal doctrine contained in these two propositions, Lord Eldon resolutely protested. In a case of seduction at Bristol, he stated that "he gladly laid hold of that opportunity of disburdening his mind of an opinion that had long laid heavily upon him, as it was in direct opposition to the judgment of one of the most learned judges and best of men that ever sat in Westminster Hall—a man to whom the laws of this country, and (what was of greater consequence even than the laws, because without them the laws would soon prove of little efficacy) the morals of the nation were as much indebted as to any man among the living or the dead. But having paid this tribute to truth, he was bound by his oath to give his own opinion, which was this—that in a civil action of this nature, the jury were bound by law to consider in awarding the amount of damages not what might be an adequate punishment to the defendant for his criminality, but what would be sufficient compensation to the plaintiff for the injury." Another misdirection of the Chief Justice was corrected by Lord

Alvanley, who ruled in opposition to him, that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife. These instances stand out as solitary exceptions to Lord Kenyon's general accuracy, but on such subjects the feelings of the moralist subdued the lawyer's discipline.

With equal energy he exerted the vindictive power of his Court to put down the dangerous spirit of gambling, which infected with its taint and leaven the fashionable classes of society. In his most blunt and emphatic manner, he protested that the higher ranks should not find themselves too great for the law; and added a threat, which must have made the purlieus of St. James's tremble, that if any prosecutions were fairly brought before him, and the guilty parties convicted, whatever might be their rank or station in the country, though they were the first ladies in the land, they should certainly exhibit themselves in the pillory. There must be something defective in the education of the nobility, he added, with a bitter sneer, when they have to come to this Court to finish it. An unfortunate young man in Newgate had last night sent him a list of the names of those to whom he had lost money, and he was extremely sorry to see among them the name of one person of rank. He would almost wish that the keepers of E. O. tables could be branded in their foreheads. His severity was so decided, that when a rule was moved for to stay proceedings in an action brought to recover penalties under the statute for money lost at play, a sum amounting to £1,300,000, on the ground that the declaration contained 480 counts, consisted of between two and three thousand sheets, and measured in length upwards of 100 yards, the Court refused to interfere and check so vexatious and oppressive a proceeding. The bitterness of the judge's invectives called forth some angry letters from General Fitzpatrick, who could not endure that their select clique should be classed with the pickpockets of the Strand. But the straight-forward Chief Justice disdained to capitulate with the world of fashion, and would neither mollify his language, nor be deterred from the prosecution of an honest purpose. Nor were his efforts less vigorous to correct the murderous crime of duelling, in which the engrossing love of intrigue and fondness for play

too frequently found their termination. He declared that whoever was convicted of having murdered his fellow-creature in a duel should suffer the course of the law; and on more than one occasion he directed the jury with inflexible justice to that conclusion, at which their clemency, false and pernicious in general, shrunk from arriving. He knew that the law of England did not recognize the possibility of one man deliberately slaying another without malice being of necessity implied, and his rectitude was too severe, his firmness too intrepid, to permit of his mis-stating the law, or deserting his duty. "It has been the fashion," he said, "with most praiseworthy firmness, for some few years last past for men who call themselves men of honour, by braving in this instance the laws of their country—it has been fashionable for gentlemen of great character and of exalted station to advertize as seconds what had passed in affairs of this kind. It would be extremely well if those gentlemen would look to the possible, nay, I would say, probable consequences of such conduct. They at least furnish evidence, which perhaps hereafter may decide on their own lives. It seems to me they yet remain to be informed of a most clear proposition of law, viz. that if men will coolly and deliberately go out on errands of this kind, accompanied by their seconds, and death ensues, beyond all controversy they are all involved in the crime of murder. Beyond all contradiction all the parties are murderers, and a judge who should fritter away the law in such a case would but ill deserve to continue on the seat of justice."

Notwithstanding his favour with the journalists, Lord Kenyon applied the lash most vigorously to the flagitious libellers who seasoned their paragraphs with scandal, that they might suit the pampered appetite of the day. His predecessor scourged them with rods, and he with scorpions. But determined as he was to punish the authors of calumnious falsehoods, the audacity of their inventors more than equalled his firmness. So much inferior in spirit are the periodical writers of the present generation to the past, that we look with astonishment at the extravagant boldness with which the reporters for newspapers could invent the most cruel and groundless aspersions on rank and beauty and innocence, without the slightest foundation in fact, for the mere

sordid object of creating a sensation, and increasing the sale. One of the most remarkable of these cases was an action brought by the Countess Dowager of Cavan, as *prochein amie* for her daughter Lady Elizabeth Lambert v. Tattersall, the proprietor of the *Morning Post*, for a series of libels inserted in that paper, to the effect that "a beautiful young lady of quality had made a faux pas with a gentleman of the shoulder-knot, and eloped with her footman." It was admitted at the trial, that the young lady was of the most irreproachable character, had never displayed the least sign of levity, but had always been the pride and joy of her friends. Lord Kenyon felt naturally indignant at the display of such wanton infamy, and resolved that the defendant should suffer a severe retribution. "It is seriously to be lamented," he said, "that the very many causes which are brought, some of them civil and some criminal, should have no effect on persons who publish newspapers, to stop the progress of this which every body complains of. If it is to be stopped, it is to be stopped by the discretion, good sense, and fortitude of juries. It is to you, and you only, that this lady can look for redress, and it is not her cause only that has been this day pleaded before you; it is the cause of injured innocence spread from one end of the kingdom to the other; and therefore if this lady is not to be protected, nay, if ordinary damages are to be given, and not such as shall render it perilous for men to proceed in this way, we are in an unpleasant situation indeed, and particularly so when we have heard it openly avowed in Court by the vendors and publishers of papers, that their papers were not suited to the public taste unless they put capsicum in them,—unless they were seasoned with abuse. I do not believe that in all the cases of libel that ever were canvassed, one so criminal as this is to be met with: for here malevolence and malignity have been pursuing this unoffending infant through the course of several months. You, gentlemen, are bound to guard the feelings of this injured lady; and what the feelings of injured innocence are, every one must feel, who is not an apostate from virtue and innocence himself. You, gentlemen, will, before you give your damages, put yourselves into the situation of this injured lady, asking yourselves if those whom you are most bound by the laws of nature and of

God to protect, had been assaulted in a similar manner, what damages you would have expected from a jury of your country: you will think on that, and form this conclusion, that those damages which in that case ought to prevail, will prevail in this case." The jury awarded 4000*L.*, and every one felt that they had not given one farthing too much.

Of a more questionable propriety, was the Court's making absolute a criminal information against the proprietor of another newspaper, for a libel, which, compared with the preceding, seems innocent and innoxious, and to which we may find many parallels among the "best possible instructors,"—such is the sounding phrase,—of our days. "The printers are much perplexed about the likeness of the devil. To obviate this difficulty concerning his infernal majesty, the humorous Peter Pinder has recommended to his friend Opie the countenance of Lord Lonsdale." Mr. Erskine, in showing cause, displayed much wit and ingenuity; prefacing with the argument, that the writer made no malicious insinuation, for that he did not recommend him to be painted with horns. Lord Kenyon hastily interrupted him, "The tongue of malice has never said that." The counsel admitted the truth of his lordship's observation, and contended that this was not a libel on Lord Lonsdale, it was a libel on the devil. But that great personage could not come there for redress, because it was a maxim in that Court, that those who apply to it should come with clean hands. The countenance of Lord Lonsdale, to be likened to the devil, was a very high compliment. His lordship fell very far short of the devil in appearance, and ought to think himself highly flattered by the comparison. He (Mr. Erskine) would give Fuseli or Opie 100 guineas for a likeness of himself, resembling the description of his infernal majesty in Milton,—

"He above the rest,

In shape and gesture proudly eminent,
Stood like a tower; his form had not yet lost
All its original brightness, nor appear'd
Less than Archangel ruin'd, and th' excess
Of glory obscur'd."

The noble lord should not complain that his countenance was compared to a much more beautiful one than his own.

The devil was handsomer than Lord Lonsdale even in masquerade. In his address to Eve, "Pleasing was his shape and lovely." He was handsomer, it appeared, in his domino, than Lord Lonsdale. Mr. Erskine then seriously contended that this paragraph was nothing but pure innocent pleasantry, and much below the gravity of the bench to notice. The other judges seemed to think, with much appearance of reason, that the plaintiff might be left to bring his action; but Lord Kenyon had made up his mind that no quarter should be given in the fierce war which then raged between courts of justice and the press. He was of opinion that they ought to protect the characters of individuals from ridicule and contempt. The Court had laid down rules, from which they should not depart, nor were they to be led away by the brilliancy and imagination of an advocate. That the paragraph was calculated to bring ridicule on the high character who complained, was proved in the speech of defendant's counsel. The puisne judges acquiesced in the reasoning of the chief, and the rule was made absolute.

On those political libels, also, which tended to convulse the peace of society, Lord Kenyon leaned heavily with all the loins of the law. The punishments awarded at his dictation to seditious language, oral or written, are justified only by the peculiar circumstances of the times, which, unless incitements to turbulence had been repressed by a strong arm, might have brought down on this country the civil horrors, which desolated France. Thus, one Frost, an attorney, convicted of saying at a coffee-house, "I am for equality; I see no reason why one man should be greater than another; I would have no king; and the constitution of this kingdom is a bad one," was sentenced to be struck off the rolls, to be imprisoned six months in Newgate, to stand once in the pillory, and to find securities for good behaviour for five years. In 1796, Kyd Wake, being found guilty of having insulted the king in his passage to and from parliament, by hissing and crying out "No George; no war!" was sentenced to be imprisoned five years, and to stand in the pillory. When Mr. Stone was acquitted of the charge of treason, in holding correspondence with France, an unanimous shout was set up in the Hall, and a Mr. Thompson being seen to join, was immediately ordered

into custody. He apologized, by saying that his feelings on the joyful occasion were such, that if he had not given utterance to them, he must have died on the spot. Lord Kenyon replied, it was his duty to suppress such tumultuous joy, which drew contempt on the dignity of the Court, and fined him 20*l*. The spirit of disaffection, then rife in the country, called for these displays of severity; and through evil report and good report, the chief justice persevered in an exhibition of firmness, which produced the happiest effects. For his conduct in two trials of this description, those of Reeve and Gilbert Wakefield, he was exposed to much obloquy; in the first, for leaning too strongly in favour of, and in the last, against the defendant. The first was an information exhibited *ex officio* by the Attorney-General, in pursuance of an address presented to his majesty by the House of Commons, for the following unguarded passages in a loyal pamphlet: "In fine, the government of England is a monarchy: the monarch is the ancient stock from which have sprung those goodly branches of the legislature, the lords and commons, that at the same time give ornament to the tree, and afford shelter to those who seek protection under it. But these are still only branches, and derive their origin and their nutriment from their common parent; they may be lopped off, and the tree is a tree still; shorn indeed of its honors, but not like them, cast into the fire. The kingly government may go on in all its functions, without lords and commons: it has heretofore done so for years together, and in our times it does so during every recess of parliament; but, without the king, his parliament is no more. The king, therefore, alone it is, who necessarily subsists without change or diminution, and from him alone we unceasingly derive the protection of law and government." "Should these branches be lopped off," said the attorney-general, Sir John Scott, "the tree may be a tree still, the king may be a king, but the king will not be a British king."

Lord Kenyon rightly thought that the power of the crown had diminished and was diminishing too rapidly for any constitutional lawyer to apprehend danger from an undue and excessive upholding of the royal prerogative. He told the jury that this was not the first prosecution instituted by the

House of Commons. "In the case of *The King and Stockdale* it was so instituted. The jury judged of the case, not because the House of Commons had judged of it, adopting their ideas that the pamphlet was a libel and punishable, but they assumed to themselves the right to judge of it by themselves: they asserted that right finally, and in that case certainly they declared the party, whom the House of Commons accused, to be not guilty. Upon the trial of that cause, it was stated to them most ably and most eloquently, that in proceeding to form their opinion upon it, they were not to select a single expression unexplained by the context, and unaccompanied by the whole of the book, and for that reason to impute guilt to the party accused. They were advised (as I shall presently advise you) to take the book along with them, to consider the whole candidly, fairly, and impartially, and from a due consideration of the whole, extract what their judgment ought to be on the passage to which delinquency was imputed." The jury acquitted Mr. Reeve, but owing to the determination of one of their number, found that the pamphlet was a very improper publication.

On the writings of the Rev. G. Wakefield, who has been well described as a *vir clarissimus* grafted on the crab stock of a Jacobin dissenter, a man who carried into the science both of grammar and of politics, a spirit of insolent dogmatism and precipitate innovation, Lord Kenyon put a less favourable construction, for, instead of presenting the dreamy extravagances of a theorist, which in these days could produce no practical mischief, they teemed with that pernicious spirit of democratic change, by which so large a portion of the people were borne headlong. One of the most violent paragraphs was the following:—"I regard (to use great plainness of speech) your archbishops, bishops, deacons, canons, prebendaries, and all the muster-roll of ecclesiastical aristocracy, as the despicable trumpery of priestcraft and superstition, and a grievous domination over the meek principles of evangelical sobriety." His long confinement in *Dorchester gaol*, and the fatal illness which it induced, have created a sympathy for this reverend agitator which, from the character of his writings, he would otherwise never have acquired. But the conduct of his judges is thus eloquently vindicated

by the liberal Sir James Mackintosh:—"I could not read Gilbert Wakefield's *Memoirs* without observing the injustice sometimes done unavoidably to statesmen and magistrates. There never was an age or a nation, in which Gilbert Wakefield's pamphlet would not have been thought punishable. There is no quotable writer for the liberty of the press, who would not allow that it was so; yet, when his literature and his sufferings are presented to the mind, long after the offence has ceased to be remembered, or when it is considered only as part of the uninteresting political controversies of a former period, sympathy for him and indignation against those who punished him, are sure to be excited. But let the pamphlet be read; let the terrible danger of the kingdom be remembered, and let a dispassionate reader determine whether Mr. Somers would not have prosecuted, if he had then been attorney-general, and whether Mr. Locke, if he had been one of the jury, would have hesitated to convict."

Fired with a spirit of rival eloquence to that which Mr. Wakefield had prodigally lavished, as he himself confessed, on a sullen judge and a yawning jury, the learned lord launched into a strain which Quintilian would scarcely have commended. "I beg leave to say that I see no good in what has lately taken place in the affairs of another country. I see no good in the murder of an innocent monarch. I see no good in the massacre of tens of thousands of the subjects of that innocent monarch. I see no good in the abolition of Christianity. I see no good in the depredations made upon commercial property. I see no good in the overthrow and utter ruin of whole kingdoms, states, and countries. I see no good in the destruction of the state of a noble, brave, and virtuous people, that of Switzerland. The general right to the liberty of the press, is neither more nor less than this, that a man may publish any thing which twelve of his countrymen think is not blameable, but that he ought to be punished if he publishes that which is blameable. This in plain common sense is the substance of all that has been said on the subject. If you think that it is possible to keep government together with such publications passing through the hands of the people, you will say so by your verdict and pronounce that this is not a libel, but in my opinion that would

be the way to shake all law, all morality, all order, and all religion in society." For the edification of the revolutionary scholar, he cited the not very novel axiom—"Ingenuas didicisse," &c., and declared his regret that the moral should have proved false with regard to him.

This addiction to classical, or rather to Latin quotation, in one who could lay no claim to scholarship, must arrest the notice of all who read his judgments, and was no less singular than unhappy. In a defective acquaintance with the learned languages, he had the precedent of some of his most distinguished predecessors. It is recorded of Sir Matthew Hale that, in translating Cornelius Nepos, he rendered "*elatus est in lecticula*," he was lifted up in his bed. Lord Hardwicke, in the House of Lords, repeating the phrase "*pendente bello*," was interrupted by Lord Carteret in a tone of classical indignation, "'*Flagrante bello*,' my lord! you mean '*flagrante bello*!'" Sir Matthew Raymond, in excuse for some unfortunate solecism, made the grave apology that lawyers were not bound to the Latin of the classics. Lord Kenyon seems to have had a similar misgiving, when, on the rare occasion of a visit to his court, by the learned Dr. Parr, he interrupted Serjeant Hill in one of his most ancient and learned citations, with an excuse, which went to the heart of the pedant, "We don't talk the best Latin in these courts, brother!" But whether from a shrewd suspicion that there were not in general many Latinists there sufficiently fresh from Eton and Oxford to detect his barbarisms, or from an idea that nothing could embellish his discourse like a quotation from a dead language, he appears never to have omitted, "*in season and out of season*," lugging forward a few favourite sentences, without much regard to their appositeness, propriety, or taste. They glitter in his harangues like the glass beads or bits of tin which savages stick upon their rude clothing, and with which they set off some stolen finery. He was fond, we are told, of using phrases, which set all classical taste and learning at defiance. He either coined or quoted them from some book, the author of which was unknown, or unheard of by any man of letters. He blended into all his speeches these intrusive scraps, and quoted them with merciless profusion, and deplorable want of taste. When he wished to express

his opinion that the established rules of practice should not be departed from, it was adorned with the figurative recommendation of the propriety "*stare super antiquas vias.*" (By the way, the "*antiquas*" was pronounced with the second syllable short, an abbreviation which no Oxford man can tolerate even on the last and most busy day of term!) But the "*melius est petere fontes quam sectari rivos,*" left in the background all his other celebrated Latin quotations. It was an ornament which suited every dress, and, like that of the learned lord himself, it was used till it had become threadbare. He would inform the bar with becoming gravity "the Court will take time to consider this case '*propter difficultatem.*'" "We will look into this act of parliament with eagles' eyes, and compare one clause with another, '*noscitur a sociis.*'"—"Go to Chancery," was his address to an importunate suitor, "*abi in malam rem.*" When counsel were disputing sharply in the Dean of St. Asaph's case a piece of evidence,—one of them saying, "we can prove this to be the prosecutor's letter," and the other retorting, "I beg leave to say you cannot, it is not evidence;" his lordship interposed, with a sort of learned charm, "*modus in rebus,* there must be an end of things." These bits of classicality, sometimes as inapplicable as if they had been picked up at random from a dictionary of quotations, are thus amusingly caricatured in that miscellany of legal anecdotes, "*Westminster Hall.*" The learned lord is there represented concluding an elaborate charge to the jury, with the observation, "Having thus discharged your consciences, gentlemen, you may retire to your homes in peace, with the delightful consciousness of having performed your duties well, and may lay your heads upon your pillows and say, '*Aut Cæsar aut nullus.*'" On another occasion, his lordship, wishing to illustrate in a strong manner the conclusiveness of some fact, ended by remarking, "It is as plain as the noses on your faces—'*Latet anguis in herbâ!*'"

His choice of words in the vernacular was scarcely more judicious, a vulgar phrase or unlucky turn of speech often marring the effect of his most grave sentences. Thus in an action on the case, for administering certain drugs to the plaintiff's wife to make her miscarry, the fact having been elicited that the child was born alive, and died subsequently,

Lord Kenyon interfered; "I cannot try it. God forbid I should look forward, but it *blinks* on murder." Declaiming on his own impartiality, he asserted, that he had known Mr. Murphy forty years, and had spent many pleasant hours in his company, but must apply to him the same rules as he would to an Indian, a Turk, or a Mahometan. He was so partial to rhetorical ornaments, classical allusions, and metaphorical language, that some of his discourses show faults as glaring as the composition of a fashionable auctioneer. When sitting in the Rolls Court, indignant at the conduct of one of the parties, who had tried every artifice to gain time, the Master astonished his staid and prosaical audience by exclaiming, "This is the last hair in the tail of procrastination!" Whether he plucked it out or not the-reporter has omitted to inform us. The Term Reports, when they use the very language of the chief, often contain a constant series of broken metaphors. For example—"If an individual can *break down* any of those safeguards, which the constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts." But to the admiration of a wondering jury, the chief justice delighted even more in allusions to the Roman history than in figures of rhetoric. "It was urged that the defendant was a young man amid scenes of gaiety. The example of Scipio might have been fresh in his memory, (if he had ever heard of him,) 'Scipio et juvenis, et cœlebs et victor;' and if the lady was a spinster, so was also the princess of Spain!" and again, "Duties of imperfect obligation must be left to a man's own feelings. He had frequent occasion to regret that the laws did not enforce them. The debt due from a person educated to a person educating was one of the strongest and most important that man was capable of. In the most polished periods of the Roman empire, one of its most splendid orators, Pliny, did not think he had discharged his duty to Quintilian by discharging the mere debt due, but felt himself bound to portion out the daughter of a man to whom he owed so much." We suspect that Lord Kenyon would have been less profuse in his illustrations had he been trained at the University instead of at an attorney's office. Coleridge in

his Table Talk has mentioned another of his favourite examples, which displays a felicitous ignorance that the whole race of Malaprops might have envied. "Above all, gentlemen, need I name to you the emperor Julian, who was so celebrated for the practice of every Christian virtue, that he was called Julian the Apostle!" But this story, we believe, is too good to be true. We must in candour confess that the learning of the (by courtesy) learned judge was not quite so shallow as to have made him commit so portentous a blunder, and the volume of *State Trials*, in which his speech is given, contains a correct allusion to Julian the Apostate. But unskilfully laid on as these patches of oratorical finery too often were, there are not wanting instances in which he used a forcible illustration, or applied a striking phrase with great effect. On one occasion he was required to afford information respecting the fees and emoluments of his court to a Committee of the House of Commons. Mr. Abbot (afterwards Lord Colchester) was the chairman, who himself held an inferior office in the King's Bench. The patience of the chief justice having been exhausted by a series of questions too nearly touching that delicate subject, the perquisites of his office, he began to demur to any further interrogatory. Mr. Abbot, assuming what he intended to be a high and commanding attitude, pompously enough informed his lordship that he was armed with the authority of the Commons House of Parliament. "Sir," was the pithy reply of the chief justice, "I will not be yelped at by my own turnspit." On a trial before him at nisi prius, some usher at a boarding school having confessed in cross-examination that he had enclosed a letter to a boy in the school, with the initials of a young lady, the learned judge expressed the most lively displeasure. The witness inquired with much pertness what there was particular in the letter? Lord Kenyon retorted by calling instantly to the usher, "Turn the minion out of Court!" This strong moral feeling—the utter indignation manifested by him at every thing base and immoral, embodying its ideas in language full of muscular vigour, now and then produced an electrical effect, which the most consummate orator might have envied. No trick of art or finished elegance could at times compete with his plain manly sense, and energetic, but often vulgar,

English, in swaying the minds of the audience. His *style* was of bone, not ivory, but he wielded it with power, and compensated by his impassioned manner the defects of an ungraceful delivery. He was in the habit of hurrying his words together in such a manner that his articulation became occasionally very indistinct. He lisped, hesitated, and stammered, when not under the influence of powerful emotion; but where he felt strongly he spoke strongly, and compelled assent to his doctrines. Several of the preceding extracts—and we might select many equally favourable—will lead a fair critic to the conclusion that his excellence in the art of persuasion fully compensated his sins against good taste, the more especially when he considers the description of persons to whom his harangues were addressed.

A very favourable specimen of his judicial oratory is presented in the case of Doe dem. Stevenson v. Walker, which, as it involved the sanity of the testatrix, and her capacity to execute a will, interested his feelings deeply. Mr. Stevenson, the legatee, had brought an ejectment against the heir at law to recover certain premises at Romford, in Essex. It appeared that in 1786, Mrs. Mary Robinson, a lady 76 years of age, of considerable fortune, died, leaving a will, by which, with the exception of a few legacies, her whole property was devised to Elizabeth Bodkin, her waiting maid, and one Stevenson, a fruit merchant, whose son soon after married Bodkin. An action had been brought by Mr. Walker, the heir-at-law, in the Common Pleas, and with the approbation of Lord Eldon the jury declared the will to be void. Mr. Stevenson was dissatisfied with this verdict, and brought the present ejectment. Erskine led for the plaintiff, and Law for the defendant. Fourteen years had elapsed. Two of the three witnesses to the will were dead. The third came forward to declare that the testatrix was, from intoxication, incapable of making a will. The man carried a showbox, after being expelled from the attorney's office, with whom he witnessed the will, and was subpoenaed for the heir-at-law. Several attorneys were called to speak to the good character of the subscribing attorney and his clerk, and to their signatures. A dissenting minister stated that he never saw Mrs. Robinson intoxicated, that the signature resembled her handwriting.

and that she had stated to him her relations should not have her property. Two warrants of attorney, which the testatrix had executed to the plaintiff, were then put in and read, dated the very month after the execution of the will. For the defence Mr. Law called Cooperson, the surviving witness, who deposed that the names of the attorney Gale, and his fellow clerk, were written before he came into the room. Mr. Gale guided the hand of testatrix. She appeared to him stupid drunk. He had mentioned to all the masters he had since lived with that the will was not properly executed. It was near twelve at night when he signed. He also called the apothecary, who swore that Mrs. Robinson had the appearance of a woman who drank; a witness, who had taken 100*l.* legacy under the will, and yet did not believe the signature her handwriting; several witnesses, who believed Cooper-son to be an honest man, and the masters with whom he subsequently lived, who all declared that he mentioned to them the circumstances of this will, and said all was not right respecting it.

After a reply from Erskine, Lord Kenyon summed up.

"This was as anxious a cause as he had been witness to. Mankind were deluded and deceived if the legislature told them they might make wills, and dispose of their property, and when they had done so the law was not to take effect. It was the balm of the human mind to think that after men had acquired a fortune by their honest industry, they would leave it to those who were most worthy, or at least to those for whom they had the tenderest affection. If they were disappointed in that, *the great and main pursuit of man in society* was disappointed. As to the verdict given in the other Court, he was disposed as he was bound in duty to do, to treat it with great respect, because it was rivetted in his mind that no man could bring his case before a jury more fit to decide it than before the merchants of the city of London. He had said so often, he had thought so always; and it was his firm opinion, never to be erased from his mind, that if he were to look round among all the judges who sat in judgment in this country, the noble lord who tried this cause in the other Court, Lord Eldon, would certainly in his opinion stand in the first rank. He could notwithstanding not doubt. The

day of debate is deferred till two of the witnesses are removed by the hand of God out of this sublunary life, and when that is done, the only subscribing witness now living, totally unknown to Mr. Walker, is met by him as he was walking up to Hampstead, with a show-box on his back, who asked him his name, and then having learned his name by the most fortunate coincidence of circumstances that ever happened, he takes him aside; '*hinc origo mali*,' a plot of gigantic villainy is hatched. The objections to this will were without form and void. Was the will executed? There had been judges who immediately rejected the testimony of witnesses who wished to invalidate their own act. They have said we will not hear such a witness. There was a very great judge, whose name was never to be mentioned without honour, who died in 1737, Sir Joseph Jekyll, who tried a cause of this sort at Chester. He thought on the whole it was better to hear them. He received the witnesses, as tradition stated, at Chester Assizes—they swore against the will, and yet the will was supported. There was another case of the same sort tried before another judge in more modern times, Mr. Jolliffe's case. The three subscribing witnesses were called, and they all with one voice swore against the will. The jury found a verdict in favour of the will. The witnesses were afterwards indicted for perjury, and all found guilty. Two of the witnesses were not here to answer for themselves, but they were not men before whom a curtain was drawn, and who had an opportunity of shutting themselves up from the observance of the world: but they lived in the face of the world and lived by their characters, and they went down to the grave without their characters being impeached. He had a right to consider them as giving their testimony; he had a right to consider them as standing in the witness-box giving their evidence, since their characters had been supported by evidence so respectable. Their character was only impeached by the testimony of one witness, who had come that day to contradict on his oath, that which he solemnly attested at a former period of his life. If this will were to be set aside, what man could be comfortable or happy? Who could rest his head on his pillow and say 'I have looked to

the right hand and to the left, I have settled all my worldly affairs, I am now happy—I have disposed of my property, and have distributed it among those objects that are the most worthy and dearest to me.’ He would distrust the evidence of a man, whose testimony contradicted the act he had done in a former period of his life. If a person executed a will in articulo mortis, there might be more danger of imposition. But this lady made her will near twenty-two months before her death. Would it be asked, ‘Will you disinherit the next of kin? That would depend on circumstances. Many had actually done it, and some with vast applause. An Earl of Lincoln, who thought he could not consistently with his character and his honour support the measures of a minister, gave up his situation, and lost his pension. This conduct was so much admired by Lord Torrington that he left him his whole fortune, though he did not know the noble Lord, and all the world were ready to clap their hands at the act. If this will should be doubted, it will invite people to discuss every will in a Court of Justice. The case is in hands where justice will be done. If there is room to pause, you will pause; but if the case is clearer than the sun, you will deliver your sentiments on it by the verdict you will give.” The jury immediately found a verdict for the plaintiff; and set the mind of the judge at ease by securing those rights of property which he so highly valued.

In guarding these rights of property against fraud or violence, and enforcing the rigours of the penal code, this Chief criminal judge of England trusted too much to the effects of terror. To use his own words he thought it very dreadful that men of business should be robbed by those they employed, and he inflicted death as the most terrible, and therefore the most preventive, punishment. Not that he was a cruel or sanguinary man; could he have consulted his own feelings, he would have borne a bloodless ermine, but he thought that his duty to the country required the passing of that sentence, the most dread and painful part of the judicial office, but which, at whatever cost to his feelings, the magistrate must perform. The number of capital convictions and executions on his circuit, have been adduced to prove that he exercised

a more merciful discretion than many of his brother judges, who appear to have inverted the celebrated saying of Wilkes, and to have resolved that, "the best possible use to which you can put a criminal is to hang him." An interesting anecdote of Lord Kenyon's sensibility was related in the House of Commons by Mr. Morris in the debates of 1811. Of the occurrence that gentleman had been an eye witness. On the home circuit, he said, some years since a young woman was tried for having stolen to the amount of forty shillings in a dwelling house. It was her first offence, and was attended with many circumstances of extenuation. The prosecutor appeared, as he stated, from a sense of duty; the witnesses very reluctantly gave their evidence, and the jury still more reluctantly their verdict of guilty. The judge passed sentence of death; she instantly fell lifeless at the bar. Lord Kenyon, whose sensibility was not impaired by the sad duties of his office, cried out in great agitation from the bench—"I don't mean to hang you: will nobody tell her I don't mean to hang her? I then felt," he justly added, "as I now feel, that this was passing sentence, not on the prisoner, but on the law." This deserved reproach never startled the learned judge, who was a devout believer in the perfection of the penal laws, and without rising superior to the prejudices of the age in which he lived, gained a reputation for mercy above his colleagues, by yielding more frequently than they did to the impulses of compassion. His humanity, active in cases of life and death so far as his conscience would allow, was less alert in behalf of those criminals to whom secondary punishments had been awarded, and never slumbered so soundly as when a fashionable libertine was to be amerced in damages, a seditious libeller to be sent to gaol, or a knavish attorney to be struck off the rolls.

[*To be concluded in the next Number.*]

ART. III.—MERCANTILE LAW—No. XX.—MERCHANT SHIPPING
(concluded.)

WE proceed in our examination into the principles and practice of general average to inquire, 2ndly, upon what the contribution is to be assessed? The ready answer is, upon all which has been benefited by the sacrifice; and such is, in fact, the rule; from which however are exempted, 1. The persons of those on board, the life of a freeman not being reducible to estimate; 2. Wearing apparel and ornaments in actual use, as accessory to the person; 3. The wages and effects of the seamen, from whom such an exaction would be unreasonable; and 4. The ammunition and victualling stores of the vessel, as being intended for *consumption* on the voyage. Subject to these exceptions, the whole of the property and interests embarked in the adventure—cargo, including the part sacrificed, luggage of passengers, ship and freight—must severally bear their proportion of the common loss;¹ and this proportion is assessed upon the *value* of the contributory subject. Simple, however, as the rule thus stated may appear, the practical adjustment of the scale is not always an easy task; and it will be necessary therefore to consider with some particularity, 3rdly. The principle and mode of assessment.

The principle then is this: that the value of the thing sacrificed shall be made good by an equal assessment upon the value of the whole contributory stock; so that in all questions of adjustment there are two items of value to be ascertained, viz. 1, that *to* which, and 2, that *upon* which, the contribution is to be made; and these it will be convenient to examine separately.

1. Where the claim is for *goods* cast overboard, the question which first presents itself is this; with reference to what time and what place is the value to be taken—is it to be the prime cost of the goods, or their increased worth on board, or their net value at the port of destination? Now it is clear that the loss to be compensated is that which has been actually sustained. Subject only to his proportion of the general charge, the owner of the goods sacrificed ought to be neither better nor worse off than he would have been if the sacrifice had not been made. It follows therefore that, if the vessel actually arrive

¹ Deck-loads, though exempted from the benefit, are subject to the charge.

at her port, the valuation should be made according to what the goods would have been worth if they, like the rest, had reached their destination; and accordingly the general practice in this country is, to estimate them at the current price in the market of consignment, minus the freight and charges which the consignee would have been called upon to pay.¹

It is on the same principle that if after the jettison the vessel by a new disaster be disabled from completing her voyage, and the cargo be consequently sold at an intermediate port, the valuation of the sacrificed goods is made at what they would have produced under such circumstances at that intermediate place; for it is evident that if they had escaped the jettison, this and no more would have been their actual worth.

In like manner a proportionate abatement is to be made from the amount of compensation when subsequent accidents of navigation have rendered necessary a partial sale of the cargo preserved, or have otherwise diminished its aggregate value; because as the goods, had they remained on board, would have been subject to the common risks, it is but fair to assign an average diminution in their value in respect of casualties which have actually occurred.

But the rule of referring the value to the terminus of the adventure is not always followed; for if the loss take place at so early a period of the voyage that the vessel puts back to her port of departure, it is usual either to replace the goods in kind, or if that be not practicable, to estimate them at the cost price, plus the charges of shipping; a practice which, though not perhaps scrupulously correct, has undoubtedly the advantage of convenience.²

¹ By the civil law the estimate was made on the *prime cost*, and this rule still prevails in many countries abroad. For the usages of foreign nations generally on this subject the student is again referred to the excellent work of Mr. Benecke on the principles of Indemnity and Marine Insurance. The Courts of this country recognize the variations in the law of other states, so far as to support payments in conformity thereto by the master or others. (See *Walpole v. Ewer*, Park, 629; *Newman v. Cazalet*, *id.* 630; *Simonds v. White*, 2 B. & C. 805.) But they require satisfactory evidence that such is in fact the law of the place. (*Power v. Whitmore*, 4 M. & S. 141.)

² In such cases the average is ordinarily adjusted immediately at the port of departure, whereas in general the settlement is made on the completion of the voyage at the port of arrival. Practically therefore it is correct to say that the value is to be estimated with reference to the place of adjustment.

For goods *damaged* by a jettison, the measure of compensation is the deterioration in marketable value, properly referable to that cause; and although there may be cases, as of perishable commodities, where it may not be easy to ascertain the quantum with accuracy, yet it is evident that this is a difficulty inherent in the subject, and not fairly attributable to any uncertainty in the rule.

Damage to the *vessel* is to be estimated by actual survey, in which great nicety is sometimes requisite for distinguishing how much of the apparent damage is fairly a subject of compensation. Articles which have been replaced, as spars, cables, anchors, or the like, are estimated at their actual cost, without reference to their intrinsic worth; but in all cases of refitting, a customary deduction of one-third is made in respect of the advantage to the owner by the substitution of new materials for old.¹

2. The value of the contributory subjects is in like manner ordinarily estimated with reference to the termination of the adventure. Thus, 1st, as to the *goods*; these, when they reach their destination, are valued for average at their net worth to the consignee, that is to say, at the current price of such goods, deducting the freight, duty, and landing charges. But when the value has been diminished by internal causes, as of corruption or decay, a question arises, whether the estimate should be taken according to their actual worth as damaged, or at the price which they would have fetched if sound; for the determining of which a distinction must be made when the claim is for articles sacrificed, and when it is for disbursements of money. It has been already seen that the right to compensation for the loss of specific articles is contingent upon the ultimate safety of the property benefited by the sacrifice, whereas the right to contribution for disbursements is absolute, creating a debt from the moment when they are made; and as the proper measure of contributory value is the condition of the goods at the time when the obligation attaches, it follows that in the former case they will contribute according to their deteriorated value at the termination of the adventure, whilst in

¹ This deduction is not made when the vessel is new; and by the custom of Lloyd's, a vessel is new until she has performed one complete voyage. See *Fenwick v. Robinson*, Dan. & L. Merc. Cases, p. 8.

the latter case, if sound at the time when the expenses were incurred, they must be assessed at the value of sound goods, whatever their subsequent depreciation. Hence, as more than one average loss may be incurred in the course of the same voyage, it may well happen that the same goods may contribute on different assessments, not only as the claim may be in respect of disbursements, or of the loss of specific property, but as one set of disbursements may have preceded, and another followed, the ascertained commencement of the internal mischief.

Subject to this distinction, goods, when sold at an intermediate port, are valued at the net proceeds of the sale there, and, when brought back to the port of departure, at their cost on board.¹ It has been already said, that the goods cast overboard are not exempt from their proportion of the common charge; and their value for contribution, whether to that or a subsequent average loss, may be readily ascertained by regarding them for this purpose as still on board, and applying to them the same criteria as to the rest.

A principle of valuation in all respects similar is adopted with respect to the *ship*, the general rule being to estimate it at what it is fairly worth to the owner at the port of discharge. In practice the ascertaining of this value is not always easy. Experience has shown that little reliance can be placed on the reports of mercenary surveyors in distant ports; and the accountants, by whom the averages are adjusted in this country, frequently prefer a more indirect, but less suspicious, mode of computation, by ascertaining the value of the ship at her port of departure, and making the necessary deductions for the wear and tear and accidents of the voyage.² As the whole of the contributory subjects must of course be measured by the same standard, it is scarcely necessary to add that the same variations of the general rule which apply to the valuation of the cargo are applicable, *mutatis mutandis*, to that of the ship.

Lastly, as to the *freight*; the benefit to the owner from the sacrifice in respect of which the average is claimed is mani-

¹ Excluding, however, the premium of insurance, which for an obvious reason cannot be brought into the average account.

² Mr. Stevens, in his Essay on Average, gives the formula for this purpose which he has usually adopted in practice, which is a deduction of 20 per cent. for partial loss, and the like for wear and tear.

festly the amount of the freight which he finally receives, deducting so much of the wages as remained unpaid at the time of the accident, and the port and other charges, neither of which would of course have been paid if the vessel had been lost. When the claim is for disbursements, the net freight must contribute, even though by a subsequent failure of the voyage, none should be ultimately earned ; and this for the reason before explained, viz. that disbursements for the general benefit create a debt—the loss of specific articles a mere liability. Thus, it has been decided, that freight in the course of being earned, however affected by subsequent contingencies, must contribute to salvage on recapture, which is a case exactly analogous to that of average for disbursements. Freight is also absolutely charged whenever the adjustment takes place at the port of departure. When a ship is chartered for a voyage out and home, with a condition making the payment of freight dependent on her safe return with the homeward cargo, it has been questioned on what principle the freight should contribute to an average loss occurring on the outward voyage. It was determined by the Court of King's Bench, upon a case of this kind, that the assessment should be made on the whole freight of the voyage out and home ; ¹ but the propriety of this decision has been impugned by a writer of great practical authority, ² on grounds apparently conclusive, and he lays it down that at all events "*when a similar case occurs again, and the general average is to be settled before the ultimate arrival of the ship*, the interest of all parties will require that the freight of the outward-bound voyage shall be separated from that of the homeward-bound voyage, for the purpose of making the adjustment." Any other rule would unquestionably violate the principle of proportion, for it is evident that, as compared with the cargo, the freight has to sustain both a double risk and a double charge. It is true that in the case referred to, the Court insisted on the fact that the vessel *had arrived*, and the freight been actually earned ; there ought, however, at least, to have been a deduction for the expenses and risks of the home voyage ; and moreover as the proper time for the adjustment of the average was the arrival of the vessel at the outward port, where the freight would conse-

¹ Williams v. London Insurance Company, 1 M. & S. 318.

² Benecke.

quently not have been earned, it may be doubted whether this *accidental* circumstance ought to have been allowed to influence the decision.¹

On the same reasoning, when the vessel goes out in ballast, the homeward freight ought not to contribute to a general average for a loss sustained on the voyage out.

From the principles thus laid down, the mode of adjusting a general average will now be sufficiently apparent. To take a simple case, let us suppose a jettison of goods belonging to *A.* and an incidental damage to goods of *B.* occasioned by the jettison, and that the vessel saved by these means, arrives without further accident at her port of destination. Now the losses to be made good are, 1st, to *A.* the price which the goods cast overboard would have fetched at the port of consignment, minus the freight, duty, and expenses; 2nd, to *B.* the difference between the price of the damaged goods and the price of the same goods in a perfect state; and 3rd, to the ship-owner the freight upon *A.*'s goods, lost by reason of their non-arrival. The parties to contribute are, 1st, all the owners of goods, including *A.* and *B.* in the proportion of the net value of their several consignments at that place; 2nd, the ship-owner upon the then value of his ship; 3rd, the ship-owner (or his underwriter on freight) upon the aggregate amount of the freights, deducting wages paid since the accident and port charges. These several values, and the aggregate amount which is to contribute, as well as that which is to be compensated, being ascertained, the sums to be received or paid by each are then easily obtained by a common arithmetical process.

It has been already intimated that the proper place for adjusting the average is the port of discharge, and that the practice of settling it in some cases at the port of departure is an exception introduced for convenience. When adjusted, it is the duty of the master to receive and pay the several contingents, and for enforcing payment he has a lien upon the goods consigned. In practice, however, it is not usual to retain for average, the master generally contenting himself with the personal liability of the parties to be charged. Whether if he omit to avail himself of the lien, the consignor can in any case

¹ See as to the contribution of freight to salvage—*post*, where the principle as here stated is adopted.

be called upon to pay, has been made a question, but it is clear that if he be the owner of the goods he is liable in respect of his ownership, though in the absence of any express undertaking it would seem that he could not otherwise be charged. In like manner, the consignee is personally chargeable if the property of the goods be in him, but not in respect of the mere receipt of them under the bill of lading, unless it be made an express condition that he shall be so.¹ If the master neglect to get in the contingents from the parties liable, the persons entitled to receive may, it seems, sue and recover each in respect of his own interest, either by a suit in equity,² or by an action at law.³ And thus having shown, with as much minuteness as our general design admits, the principle and origin of general average—the equitable considerations on which it is based—in respect of what it may be claimed—upon what it is to be assessed—and the principle and rate of contribution, we pass to the consideration of that other incidental charge which has been mentioned under the name of salvage.

SALVAGE, in legal and mercantile acceptation, signifies a recompense to those by whose efforts ships or goods have been rescued from destruction by wreck or other accidents of navigation, or retaken out of the possession of an enemy;⁴ and being a right which rests on obvious principles both of equity and of policy, it has found a place in the maritime code of all trading nations.

A remuneration for work actually bestowed belongs to every one who lends his service to another; but in cases where not only property of great amount, but frequently life itself, is at stake—where the service is always inconvenient, and often exceedingly perilous—it is evident that something more than a mere compensation is required. On the other hand, the law recognizes no service, however great or meritorious, in the saving or recovery of the effects, as superseding the absolute

¹ *Scaife v. Tobin*, 3 B. & Ad. 523.

² *Shepherd v. Wright*, Show. Parl. Cases, 18.

³ *Marshall v. Dutrey*, Select Cases of Evid. 58; *Bitkley v. Presgrave*, 1 East, 220; *Dobson v. Wilson*, 3 Campb. 480.

⁴ In the case of *The Governor Raffles*, 2 Dods. 14, Lord Stowell observes—"It has been said that no exact definition of salvage is given in any of the books—I do not know that it has; and I should be sorry to limit it by any definition now."

title of the owner. Even when goods have been lost, or under the pressure of a present exigency abandoned, the finder is not suffered to appropriate them, with whatever risk or exertion obtained, so long as the owner is known, or by reasonable pains can be discovered. Still it cannot be denied, that this regulation of society, however expedient, contradicts an instinctive, and not altogether irrational, notion of right; and policy suggests that we should regulate, rather than seek to extinguish, that cupidity which furnishes the strongest, if not the only, incentive to perilous exertion. There is need, in short, of the bounties, as well as of the terrors, of authority; and accordingly our law, whilst it punishes with necessary severity the licentious plunderers of a wreck, deals out compensation with a liberal hand to all who give effectual succour to a vessel in distress, or rescue property from destruction.

In assigning the measure of this compensation there is necessarily much difficulty. A niggardly remuneration would be not only unjust to the salvors, but impolitic as regards the body of merchants, shipowners, and underwriters, whose property is adventured on the deep. It is reasonable moreover, that regard should be had not to the labour merely, but also to the hazard and inconvenience of the service, the extent of benefit conferred, and the value of the property saved. On the other hand, as men are prone to overrate their own services, and as there is moreover in the actual position of the salvors, invested as they are with a temporary supremacy, a strong temptation to urge unreasonable pretensions, it is evident that the mediation of the law will be as necessary to moderate the exactions of the one party, as to correct the parsimony of the other. Between these two extremes the scales are to be held with a steady hand. In one species of service, that, namely, of recapture from an enemy, it has been thought expedient to *fix* by law the rate of remuneration at a certain proportion of the recaptured property, but in all other cases, as it would be difficult to assign any general measure, or even scale of compensation for services varying indefinitely in their character and circumstances, a large discretion has been necessarily left to the tribunals by which it is awarded.

In treating of salvage, we shall have to consider, 1st, for what acts, and under what circumstances, it may be claimed;

2nd, certain legislative provisions as to salvage of stranded property; 3rd, the rate of remuneration—the tribunals by which, and the principle on which it is adjusted—and the means of enforcing payment; 4th, the parties entitled to it, and the apportionment of the several shares; 5th, the parties by whom, and the interests in respect of which salvage is payable; and as the subject naturally divides itself into salvage in case of wreck and other accidents of a like nature, and salvage upon recapture, it will be convenient to preserve this distinction throughout the several heads of inquiry.

I. As to the acts which confer a right to salvage:—The cases out of which a claim for salvage of the kind first mentioned ordinarily arises, are either succour afforded to a ship in distress at sea, or taking possession of and navigating into harbour a vessel abandoned, or, in law phrase, *derelict*,—or aid rendered in the rescue of ship or cargo, after a stranding or wreck upon the coast. Now the word *salvage* imports that something has been *saved*; or, expanding the term, that property has been preserved (for the law does not *directly* concern itself with life, the value of which it has no means of estimating), which, but for the interposition of the salvor, would have perished, or at least have been lost to the owner. Two conditions, therefore, are requisite; viz., an actual jeopardy, and an effectual rescue; and hence it follows, first, that a claim of salvage, properly so called, cannot be sustained, either for ordinary assistance afforded on request in a case of mere embarrassment or difficulty, or for an officious interference, the necessity of which is denied, or not clearly apparent;¹ and, second, that no exertions, however praiseworthy in themselves, can entitle to salvage, unless some benefit have resulted from them to the party from whom it is claimed.²

¹ In the *Upnor*, 2 Hag. 3, salvage was refused for bringing into port a barge found (without anchor or crew) aground, on evidence that it was not uncommon to leave barges there and fetch them off afterwards. Lord Stowell, in the case of *The Joseph Harvey*, 1 Rob. 306, strongly reprobated an attempt to convert a case of pilotage into a salvage. See also *The Sarah*, ib. 313, n. in which the principles by which the Court is guided are laid down; and *The Vrow Margaretha*, 4 Rob. 103. As to what degree of distress will justify an interference, see the case of *The Blendenhall*, 1 Dods. 414.

² See *Cox v. May*, 4 M. & S. 152; and post.

Again, the act must be a meritorious service proceeding from strangers to the vessel, not the mere performance of a duty by those who are connected with it. Hence the crew of a ship, however great their merit, can never assume the character, or claim the remuneration, of salvors.¹ Passengers also, so long as they continue necessarily with the vessel, owe their best efforts for its preservation, and are entitled to no salvage;² but they differ from the crew in this—that whereas the latter are bound to stay by the ship so long as a hope remains, the passenger may quit her whenever an opportunity presents itself;³ so that for services freely rendered, after an opportunity of withdrawing, and at the solicitation of those on board, a passenger may fairly claim the privilege and recompense of a salvor.⁴ Ships in the service of his Majesty are bound to give assistance to British vessels in distress;⁵ nevertheless, here also, when extraordinary efforts have been made, and serious risks encountered, the right of the officers and crew to salvage has always been recognized and upheld.⁶

Salvage in recapture is due for vessels or cargo retaken out of the hands of an enemy or pirates. By the maritime law of England, the right of the owner of captured property, or, as it is ordinarily termed by jurists, the *jus postliminii*, continues until condemnation by a competent tribunal.⁷ It follows, therefore, that property retaken at any time before sentence must be restored to the owner, and that the re-captors have.

¹ The Governor Raffles, 2 Dods. 14; and post.

² The brig Branston, homeward bound, got into distress, and a lieutenant of the royal navy, a passenger, having contributed his assistance, claimed to be remunerated for his services; but *per Cur.* "Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly is this the duty of one whose ordinary pursuits enable him to render most effectual service. I reject the claim." Branston, 2 Hag. 3.

³ *Ibid.* "A passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of leaping from the ship and saving his own life."

⁴ Newman v. Waters, 3 Bos. & Pul. 612. The captain having abandoned the ship, those who were left on board applied to a passenger, who had been a naval captain, to take the command; which he, though he might have also quitted the vessel, consented to do, and saved the vessel. The owners offered him 200*l.*, and the jury awarded 400*l.*, which the Court afterwards upheld.

⁵ Belle, 1 Edw. 66; Francis and Eliza, 2 Dods. 116.

⁶ Mary Ann, 1 Hag. 168.

⁷ Our law differs in this respect from the general law, by which the property is changed absolutely so soon as the vessel is carried *infra praxidia*,

consequently a salvage merely. After sentence, the property of the former owner being thereby divested, they acquire the full and absolute right of captors.¹ For neutral property recaptured salvage is not in general allowed, because, as the condemnation of such property is contrary to the rules of international law, it is not without cause to be presumed that it would eventually have been decreed.² But if the practice of the country to which the captors belong has been, however improperly, to condemn in such cases, then, as the danger from which the property has been rescued was real, the claim of salvage is admitted.³ On the same principle, if by the conduct of the owner the character of neutrality has been abandoned or forfeited, then, as the property would have been subject to condemnation if not retaken, so, being retaken, it becomes subject to salvage.⁴ As the relation of the crew to the vessel is dissolved by a capture, it is evident that a recapture by their efforts gives them the same right to salvage which mere strangers would have had;⁵ and the same thing has been held in favour of a convoying ship for the retaking of one of the fleet under its protection, after an effectual possession by the enemy.⁶ But

¹ *Charlotte Caroline*, 1 Dods. 192.

² *The Huntress*, 6 Rob. 104; *The Robert Hall*, 1 Edw. 265.

³ *The Carlotta*, 5 Rob. 54; *The Eleonora Catharina*, 4 Rob. 156; *The Actæon*, 1 Edw. 254.

⁴ *The Fanny*, 1 Dods. 443.

⁵ *The Two Friends*, 1 Rob. 271; *The Beaver*, 3 Rob. 292. This last was a case of singular gallantry. A British merchant ship having been taken by a French privateer, and all the crew except the master and a boy taken out, the master rose on five Frenchmen who had been put on board, knocked down the prize-master, and seizing his pistols, the only fire-arms on board, drove the rest of the crew down below, and gained possession of the ship. He then steered towards the English coast, and had nearly perished in a storm, when he got help from an English frigate. All now went on board the frigate, the condition of the ship appearing desperate. But, the storm abating, the master again went to his ship, and finally succeeded in bringing her into port. The ship was worth 6,000*l.* and Lord Stowell adjudged a salvage of 1,000*l.*, in the proportion of 850*l.* to the master, and 150*l.* to the boy.

⁶ *The Wight*, 5 Rob. 315. In the *Hichinbrook*, 1786, the Court of Admiralty had refused salvage. But the sentence was reversed on appeal. There is no doubt, however, that neglect on the part of the protecting vessel giving occasion to the capture, would defeat the right to salvage.

it is not so in the case of a rescue from mutineers, because the possession of the vessel by insurgents does not release the rest of the crew from the obligation of service.¹ Mere assistance afforded by the commander of a king's ship in quelling a dangerous mutiny on board a convict ship, has not been considered as warranting a claim of salvage, being in truth no more than the discharge of a peremptory duty.²

The right of a salvor once acquired cannot be superseded by the intrusion of others, unless under circumstances of manifest necessity. Cases have indeed more than once occurred, where the officers of a king's ship have dispossessed the original salvors and claimed the privilege for themselves, but the Courts have steadily discountenanced such pretensions, unless it clearly appeared that the misconduct or incapacity of those found in possession was such as to justify the interference.³

II. The law of England has, from the earliest period, left the jurisdiction of all matters happening on the open sea, whether civil or criminal, to the Court of Admiralty; but in the dangerous navigation of our narrow seas frequent instances unhappily occur of wrecks on shore, in which the immediate and summary interposition of the law is peremptorily called for. In the infancy of our maritime trade a few simple regulations, having mainly, as it seems, regard to the rights of the crown or its grantees in the franchise of wreck, were all that

¹ *The Governor Raffles*, 2 Dods. 14. This was a case of great merit, in which the carpenter and others of the crew had, with signal courage, rescued the ship and cargo from insurgent Malays, who had taken possession of the ship. The Court reluctantly refused the claim. "It appears to me," said Lord Stowell, "that it is the bounden duty of the crew to give every assistance in their power to prevent or quell a mutiny, and to use their utmost exertions to preserve or recover the possession of the vessel and goods of their employers. The case is extremely different from that of rescue from an enemy, because there, the moment the capture is effected, the crew are discharged from their duty to their employers. The contract between the parties is at an end. The seamen no longer constitute the crew of the vessel, but become prisoners of war. Not so in the case of mutiny, for that does not discharge them from their duty to their owners, whose property they are bound, if possible, to recover. I do not mean to say that they are called upon to sacrifice their lives wantonly and to no purpose, but I think they are bound to use their best endeavours whenever there is a reasonable prospect of success."

² *The Francis and Eliza*, 2 Dods. 115.

³ *The Blendenhall*, 1 Dods. 414; *The Maria*, 1 Edw. 175.

was deemed necessary ; but in later days the interests of commerce have demanded of the legislature effectual protection not only against the plunder of wrecks and its attendant atrocities, but also against the extortionate exactions of those who by their services acquire a lien upon property saved from ship-wreck. Various statutes have consequently from time to time been passed containing regulations to be observed in the case of vessels stranded or in danger upon the coast, of the enactments of which, so far at least as they are applicable to the subject under consideration, it will be necessary to take a brief survey.

The statute first in order is that of the 12 Ann. st. 2, c. 18, the preamble of which is worthy of notice for the view which it affords of the then state of the law, and of the prevailing practices for which a remedy was required. It sets forth that, "by an act made in the third year of the reign of King Edward I. concerning wrecks at sea, it is enacted, that where a man, a dog or cat, escape quick out of the ship, such ship, nor barge, nor any thing in them, shall be adjudged a wreck, but the goods shall be saved, and kept by view of the sheriff, coroner, or king's bailiff, and delivered into the hands of such as are of the town where the goods were found ; so that if any sue for those goods, and after prove that they were his, or perished within his keeping, within a year and a day, they shall be restored to him without delay, and if not they shall remain to the king, or to such others to whom wreck belongeth ; and he that otherwise doth, and thereof be attainted, shall be awarded to prison, and make fine at the king's will ; and that by another act made in the fourth year of the reign of the said King Edward I. (intituled *De Officio Coronatoris*) concerning the wreck of the sea, it is enacted, that wheresoever it be found, if any lay hands of it, he shall be attached by sufficient pledges, and the price of the wreck shall be valued and delivered to the town." It then goes on to state, that "great complaints have been made by several merchants, as well her Majesty's subjects, as foreigners trading to and from this kingdom, that many ships of after all their dangers at sea escaped, have v home, run on shore, or been stranded on t and that such ships have been barbarously

Majesty's subjects, and their cargoes embezzled, and when any part thereof has been saved, it has been swallowed up by exorbitant demands for salvage, to the great loss of her Majesty's revenue, and the much greater loss of her Majesty's trading subjects." After this not very flattering picture of the evil, the statute proceeds to the remedy; but as its provisions have been materially modified, and extended by several subsequent enactments, it will be convenient to give at one view the general result of the whole; 1st, as they regard the means adopted for the preservation and safe keeping of property wrecked; and 2dly, as they concern the remuneration.

1. All deputy sheriffs, justices of the peace, mayors, bailiffs, and other head officers of corporations and port towns near the sea, coroners, commissioners of land-tax, constables, headboroughs, tithingmen, and officers of the customs or excise, upon application made to any of them, by or on behalf of the chief officer of any vessel belonging to the king's subjects or others, in danger of being, or actually being, stranded or run on shore, are empowered and required to command the constables of the ports nearest to the coast to call together as many men as shall be necessary to the assistance and for the preservation of the distressed ship and its cargo; and if any other ship belonging to the king or his subjects, happens to be riding at anchor near the place of distress, the officers of the customs, and constables, or any of them, are empowered and required to command of the superior officer of such ship, assistance by his boats, and such hands as he can conveniently spare; and if such superior officer refuse or neglect to give such assistance, he forfeits £100.¹

2. To prevent confusion, the persons assembled are to conform, in the first place, to the orders of the master or other officers or owners, or the persons employed by them; and for want of their presence and directions, to the orders of the persons authorized to execute these statutes in the following subordination, as they happen to be present; viz. officer of the customs, officer of excise, sheriff or his deputy, justice of the peace, mayor or chief magistrate of a corporation, coroner, commissioner of the land-tax, chief constable, petty constable, or other peace officer, under the penalty of five pounds, for

¹ 12 Ann. st. 2, c. 18, s. 1; and 26 Geo. II. c. 19, s. 9.

wilful disobedience of such orders, to be levied by warrant of a justice.¹

All persons employed in the saving or recovering of life or property from wreck, are authorized to pass with carts and carriages over lands near to the part of the sea coast where the vessel is wrecked, if there be no road equally convenient and expeditious, and also to place on such land any part of a wrecked vessel or goods for a reasonable time, until they can be removed to some warehouse or place of deposit, making a compensation to the owner of the land, to be adjusted, in case of disagreement, by the arbitration of two justices of the peace, or a third party, to be named by them, and to be a charge on the goods in like manner as salvage;² and the owner or occupier of the land interrupting or impeding such passage or placing, is subjected to a penalty of £100.³

Unauthorized intrusion on board the vessel may be repelled by force,⁴ and not only the sheriff, but in his absence any justice of the peace, may, in case of need, call out the power of the county, to restrain violence or plunder.⁵

Means are provided for giving publicity to the disaster, by requiring the officers of the customs to cause all who can give information to be examined before a justice of the peace, as to the name or description of the ship, the names of the master and owners, and of the owners of the cargo, the places of departure and destination, and the occasion of the ship's distress, a copy of which examination is to be transmitted, with an account of the goods preserved, to the secretary of the Admiralty, who is to publish in the next gazette so much of the particulars as may be necessary for the information of parties interested.⁶

In order to assist the owners in the recovery of property, no lord of the manor or other person claiming to be entitled to wreck or goods, is permitted to appropriate or dispose of the same, until he shall have caused to be given, in writing, to the deputy vice-admiral of that part of the coast, or to his agents, if they reside within fifty miles, or if not, then to the

¹ 26 Geo. II. c. 19, s. 10.

² 53 Geo. III. c. 87, s. 4.

³ *Ib.* s. 5.

⁴ 12 Ann. st. 2, c. 18, s. 3.

⁵ 26 Geo. II. c. 19, s. 13.

⁶ *Ib.* s. 15.

Corporation of the Trinity-house, a report, containing an accurate and particular description of the wreck or goods found, and of the place where and time when found, and of any marks thereon, and of such other particulars as may the better enable the owner to recover them; and also of the place where they are deposited, and may be found and examined by any person claiming any right to them; nor until the expiration of one whole year and a day after the delivery of such notice: the deputy vice-admiral or his agent are, within forty-eight hours after receiving such report, to transmit a copy thereof to the secretary of the Corporation of the Trinity-house, upon pain of forfeiting for any neglect to transmit such account, 50*l.* to any person who shall sue for the same; and the secretary is to cause such account to be placed in some conspicuous situation, for the inspection of all persons claiming to inspect and examine it.¹

If the goods found or taken possession of be of a perishable nature, or so far damaged that they cannot be kept, they may in that case be sold by the authority and under the superintendence of a justice of the peace, and the proceeds will remain in the same custody, and be applicable to the same purposes as would the goods themselves if they had remained unsold.²

Goods saved may be forwarded to their port of destination or shipment, without the hindrance of the officers of excise or customs, due security having been taken for the protection of the revenue.³

The statutory regulations as to less valuable property obtained or preserved under circumstances of inferior merit, are principally these:—

Pilots and others taking possession of anchors, cables, or other articles wrecked or left upon the coast, or within any harbour, river, or bay, shall send notice thereof, within twenty-four hours, to the nearest deputy vice-admiral or his agent, delivering the articles at such place as may be appointed, under pain of being deemed receivers of stolen goods.⁴ The deputy vice-admiral, or his agent, is to report the goods so deposited to the Trinity-house, when the value amounts to

¹ 53 Geo. III. c. 87, s. 2; and 1 & 2 Geo. IV. c. 75, s. 26.

² 1 & 2 Geo. IV. c. 75, s. 27.

³ *Ib.* s. 28.

⁴ *Ib.* s. 1.

20*l.*,¹ and he may also seize such articles as have not been reported to him, and is required to keep and report them to the Trinity-house as aforesaid ;² if he seize them without previous information, he is to have one-third of the value ; if he seize in pursuance of information, the third is to be divided between him and the informer.³ If the articles are not claimed within a year and a day, they are to be sold, and the money applied in the manner particularly directed ; the deputy vice-admiral, or his agent, and the person who may have given information, being in such cases entitled to the salvage allowed upon unclaimed property.⁴

Masters and others bound to foreign parts, finding or taking on board anchors, goods, &c. knowing them to be found, are to enter the same in the log-book, with the place and time of finding, and to transmit a copy of such entry by the first possible opportunity, to the Trinity-house, and to deliver up the articles on their return home, which, if not claimed, are to be sold within a year and a day, according to the before-mentioned statute of Anne.⁵ Masters selling such articles incur a penalty of not less than 30*l.* and not more than 100*l.*⁶

Pilots, boatmen, or other persons, conveying anchors and cables to other countries, and disposing of them there, are to be adjudged guilty of felony, and may be transported for seven years.⁷

The coast and harbours comprehended under the name of the Cinque Ports were not, unless specially mentioned, included in the operation of the general statutes ; but by separate enactments, regulations are prescribed for this district, similar in substance to those last-mentioned ; and places of public deposit are appointed, to which all anchors, cables, &c. found, and all goods, stores, and other property saved or recovered from wreck, are to be brought, under severe penalties, for the purpose of being restored to the rightful owners, on payment of a reasonable salvage.⁸

It remains to examine, 2dly, the regulations of the legislature as to the remuneration to salvors of stranded property ; and this

¹ 1 & 2 Geo. IV. c. 75, s. 2.

² S. 3.

³ Ss. 3 & 5.

⁴ S. 6.

⁵ S. 13.

⁶ *Ib.*

⁷ S. 15.

⁸ See 1 & 2 Geo. IV. c. 76.

brings us to the third head of the inquiry originally proposed, of which it is manifestly a branch.

III. It is evident, as has been already intimated, that no amount or even rate of salvage could be fixed by law, which would be fairly applicable to all cases; it is also evident that disputes must frequently arise as to the just degree of remuneration between the parties receiving and the parties bestowing the service. Conflicting claims, moreover, may be made to the reward itself; and of those clearly entitled, some may deserve a greater, others a less, proportion of the amount adjudged. What is wanted, therefore, is a tribunal to decide upon the title, adjust the amount, assign the proportions, and enforce the payment. Now the Court of Admiralty, to the cognizance of which most of these cases would properly belong, by its constitution and the large discretionary powers which it wields is admirably fitted for adjudicating on the indefinitely varying claims of salvage; and it is mere justice to say that the recorded cases bear ample testimony to the patient and enlightened equity with which this branch of its jurisdiction has been administered. Still, as the machinery of that Court is somewhat cumbrous, and its proceedings slow and expensive, the legislature has thought fit to provide (more especially in cases of wreck on shore, in which the jurisdiction of the Admiralty might sometimes be questionable),¹ more summary and cheaper methods of ascertaining the amount, and procuring the payment of salvage; and these it will be convenient first to advert to.

1. By the before-mentioned statute of Anne it was enacted, that all persons employed in preserving ships or vessels in distress, or their cargoes, should, within thirty days after the performance of the service, be paid a *reasonable reward* for the same by the commander, master, or other superior officer, mariners or owners of the ship or vessel in distress, or by any merchant whose vessel or goods should be so saved, and that in default of such payment, such vessel saved should remain in the custody of the officers of customs until all charges were paid, and all the persons concerned in the preservation of the ship *reasonably gratified* for their assistance and trouble, or good security given for the purpose.²

¹ The original jurisdiction of the Admiralty is not affected by these statutes.

² 12 Ann. stat. 2, c. 18, s. 2.

It was further provided, that in case of disagreement touching the monies deserved by any of the persons so employed, the parties respectively interested might nominate three of the neighbouring justices of the peace, who should thereupon adjust the quantum to be paid to the several salvors, and the adjustment so made should be binding on all parties and be recoverable by an action at law. And that in case no person should appear to claim either the whole or any portion of the goods saved, then the chief officer of customs of the port nearest to the place where the vessel was in distress, should apply to three of the nearest justices of the peace, who should put him or some other responsible person in possession of the goods, first taking an account in writing to be signed by the officer; and if the goods should not be legally claimed within twelve months by the rightful owner, they should then, or if perishable goods immediately, be sold, and the proceeds, after deducting charges, be transmitted to the Exchequer, there to remain for the benefit of whoever should establish his right to the satisfaction of one of the barons of the Court.¹

But this enactment was defective in several particulars, and among others, that it was confined to persons employed by and acting under the authority of certain public officers, and that no provision was made for adjusting the salvage in case the parties should not agree in the nomination of justices. It was therefore by a subsequent statute directed,² that the justice of the peace, mayor, bailiff, collector of the customs, or chief constable who should be nearest to the place where any ship or goods should be stranded, should forthwith give public notice for a meeting to be held as soon as possible of the sheriff or his deputy, justices of the peace, chief magistrates of towns corporate, coroners and commissioners of the land-tax, who, or any five or more of them, were required and empowered to examine persons upon oath, adjust the quantum of salvage, and distribute the same among the parties concerned. And by another clause³ it was provided, that in case

¹ 12 Ann. stat. 2, c. 18, s. 2.

² 26 Geo. II. c. 29, s. 6. This is but clumsy machinery, and it may be doubted whether it has been often, if at all, put into operation; at all events it seems to be now superseded by the later enactments.

³ S. 5.

any person not employed by the master, mariners, or owners, or other persons lawfully authorized in the salvage of any ship or the cargo or provisions thereof, should, in the absence of persons so employed or authorized, save any ship or goods, and cause the same to be carried for the benefit of the proprietors into port, or to any adjoining custom-house or place of safe custody, immediately giving notice thereof to some magistrate or officer of excise or customs, such person should be entitled to a *reasonable reward* to be paid by the master or owner of the vessel or goods, and to be adjusted in case of disagreement about quantum in the same manner as other salvage.

A third statute¹ was required to extend the benefit of salvage to persons acting "under and by the mere employment and authority of the commander or other superior officer, mariners, or owners" of a vessel in distress, without recourse first had (as oftentimes it would be impossible that it should be had) to the public officers mentioned in the former statutes, and the same enactment provided, that in case the parties respectively interested should disagree in the nomination of three justices of the peace for the adjustment of the amount, either might apply to one such justice, who might nominate two others, and the three might make the award.

By a later statute,² containing, among other things, the regulations which were before detailed as to the salvage of less valuable property accidentally picked up, it is enacted, that in case of disagreement as to the amount of salvage to be paid, the matter shall be determined (it is to be presumed on the application of either party) by three justices of the peace residing near to the place where the goods are deposited, who are to commence the inquiry within forty-eight hours from the time of reference; and if the justices cannot agree, they may nominate any third person, conversant in maritime affairs, who shall ascertain the amount within forty-eight hours from his nomination.³

And by a subsequent clause⁴ it is enacted, that it shall

¹ 48 Geo. III. c. 130, s. 21 and 22. And see also 49 Geo. III. c. 122, s. 32, and 1 & 2 Geo. IV. c. 7, s. 37.

² 1 & 2 Geo. IV. c. 75.

³ *Ib.* s. 7.

⁴ *Ib.* s. 8.

also be lawful for the said justices to decide in the like manner, and within the same time [of forty-eight hours], on all claims and demands whatsoever, which may be made by pilots, boatmen, or *other persons* for service of any description (except pilotage) rendered by them to any ship or vessel, as well for carrying off from the shore to such vessels any anchors, cables, or other stores from any port of the coast, or for the saving and preserving any goods or merchandize which may have been wrecked, stranded, or cast away from any ship or vessel, or for being instrumental in saving the life of any person on board, the master, owner, or his agent being present with the justices; and that the said justices shall have full power and authority to hear and determine *on all cases whatever* of services rendered by pilots, boatmen, and others to ships or vessels (except pilotage), whether such vessels shall at the time be in distress or not. In cases of salvage, however, properly so called, an appeal is allowed to the Court of Admiralty on notice to the justices within ten days after such award is made,¹ and prosecution of the appeal by the taking out of a monition within thirty days from the date of the award; in which case the goods upon which the salvage is claimed, are to be delivered up to the owners on their giving sufficient bail for payment of the sum awarded.

Similar provisions are, by a separate statute,² made applicable to the liberties of the Cinque Ports, the only difference being, that for justices of the peace are substituted three commissioners "in each of the Cinque Ports, two ancient towns and their members, to be appointed by the lord warden," who are to exercise the like jurisdiction over claims of salvage and other service; and that the notice of appeal to the Court of Admiralty must be given within eight days, and the proceedings be commenced within twenty days from the making of the award. And by the same statute, the remedies which were given by the act of Queen Anne for the adjustment of salvage, are extended to the Cinque Ports in the case of assistance given without reference to the public authorities.³

By the common law any person, who by his exertions had

¹ See the case of *The Industry*, 2 Hagg. 73, as to the computation of this time.

² 1 & 2 Geo. IV. c. 76.

³ S. 19.

rescued property from destruction, would be entitled to a lien upon the property so saved for the remuneration of his service and the reimbursement of his expenses. By the enactments of the several statutes which have been referred to, the effects so preserved are placed in the custody of responsible officers, but they remain nevertheless specifically subject to the charge of salvage. And by the last statute, supplying in that respect an omission of the former ones, the owners, or in case of refusal by them, the salvors, are authorized to sell so much of the property saved, as may be sufficient for defraying the salvage and charges which shall have been awarded by the justices or the Court of Admiralty, or agreed upon between the parties.¹ And the commissioners of the customs are required to permit the sale of *such* property (that is to say, of so much as shall be sufficient for the purpose) free from the payment of all duties.² Similar provisions have been also applied to the jurisdiction of the Cinque Ports.

The machinery thus provided for the adjustment of salvage has received the high approbation of Lord Tenterden in his excellent Treatise; nevertheless it may be doubted whether justices of the peace can, from the nature of their appointment, constitute a satisfactory tribunal for the determination of such cases, and it seems, one would think, an obvious improvement, that commissioners should be nominated, as in the Cinque Ports so in other towns along the coasts, for the special adjudication of this, and perhaps of other maritime claims requiring summary adjustment, such as the wages of mariners and the like. The methods provided by the earlier statutes appear to have been seldom resorted to, but the provisions of the last enactment, by which three neighbouring magistrates are empowered, on the application of either party to adjudicate upon the claim, have been not unfrequently called in aid in cases where the service and consequently the salvage was of considerable magnitude.³ Whenever the

¹ 1 & 2 Geo. IV. c. 75, s. 38.

² 6 Geo. IV. c. 107, s. 7.

³ For cases of appeal from the decisions of magistrates, the reader is referred to *The Vesta*, 2 Hag. 189; *The Brothers*, ib. 195; *Oscar*, ib. 257. In this last case the following apposite and sensible observations were made by the learned judge Sir C. Robinson:—"The stat. 1 & 2 Geo. IV. c. 75, was intended to provide for the reduction of expenses, and to prevent delay in small cases; and although under

amount claimed is large, recourse will still be had to a higher authority, even in the case of stranded property, and to salvage for services at sea the statutes have, as we have seen, no application. Questions of salvage performed between high and low water mark, are, by one of the late enactments, declared to be within the jurisdiction of the Court of Admiralty or the Courts of Westminster.¹ But the constitution of these latter unfits them for dealing with conflicting claims, or making an equitable distribution of property, so that in the result, by far the greatest part of the disputed cases of salvage fall either immediately or appellately under the cognizance of the Court of Admiralty.

The usual method of proceeding in that Court is shortly as follows:—The salvor issues a summons, or as it is there called a *monition*, to the parties from whom he claims compensation, whereby jurisdiction is given to the Court over the cause and the property which is affected by the claim. At this stage of the proceedings it is advisable for the party resisting the demand, to pay into Court such sum as he considers to be an adequate remuneration, in which case, if the Court

the general words of the eighth clause it may be competent to the magistrates to proceed in cases of greater magnitude, it is manifest that the primary object of the act was to provide for small and occasional services only, such as those specified in the act: and the magistrates cannot proceed in cases of a higher description with the same prospect of benefit or advantage to the parties; in large cases the interest will be likely to induce one party or the other to be dissatisfied with the award, and to appeal to the High Court of Admiralty: there must then be the expense of two proceedings, which, as in this instance, will amount to nearly as much as the salvage. The owners must ordinarily, and except in cases of positive misconduct, defray these expenses; and it would therefore be an improvement of the act, if they had the power of removing the case to the Court of Admiralty in the first instance. The magistrates may judge with advantage of local circumstances, and of the value of the loss or damage occasioned to the salvors in consequence of their exertions, but they are inadequate judges of the principles that ought to govern cases of value, with reference to rules of general policy, or the consistent application of analogies drawn from other cases, which is so desirable to be observed; and, more particularly, they must be very ill qualified to apply a rate of proportion, as they have done in this, and in a former case, by giving integral proportions of the value, the rates of simple proportion graduate at large intervals; while the estimate of services, labour, and enterprize, requires to be made as minutely as possible under an infinite variety of particulars, and may, therefore, be better done by the allowance of precise sums." The Court of Admiralty, however, supports the award of magistrates, unless there be an obvious departure from principles.

¹ 1 & 2 Geo. IV. c. 75, s. 31.

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another, where the service was most perilous, the Court added two-thirds,¹ and in a third, where a captured ship had been deserted by the captors and subsequently recovered and brought into port with considerable risk, trouble, and discomfiture, a moiety was given.² In a case in which the value of the ship and cargo was no less than 275,000*l.* but where the risk was inconsiderable, and the service had been performed by a privateer, who had herself previously received assistance from the Crown, the sum of 4000*l.* was allotted.³ In another instance where the value was small, and the service also trifling, a moiety of 50*l.* was deemed sufficient.⁴ One-tenth was given for the rescue of a slave ship from insurgents,⁵ and a seventh to an American captain who had purchased a British vessel from a French privateer, by whom she had been captured, with the intention of restoring her to her owners.⁶ Steam-boats assisting vessels in distress receive a liberal consideration from the Court.

The rate of salvage on vessels re-captured, was, during the war with France,⁷ as in the previous one with America,⁸ fixed at one-eighth for vessels of the royal navy, and one-sixth for private ships; and it is probable that a similar regulation could be made in the event (let us hope far distant) of a like calamitous necessity.

IV. The equitable apportionment of the amount adjudged among the several claimants, is by no means the least delicate

The Jonge Bastiaan, 5 Rob. 322.

The Elliotta, 2 Dods. 75. See also *L'Esperance*, 1 Dods. 46, where the same proportion was given though the value was large, (12,000*l.*)

The Waterloo, 2 Dods. 433.

⁴ *Vrow Margaretha*, 4 Rob. 103.

The Trelawny, 4 Rob. 223. In this case also the service was performed by a vessel in the same trade, and this is a circumstance always taken into consideration in the reduction of the amount of salvage. In one case (*The Zephyr*, 2 Hag. 43,) where two vessels in the Honduras trade set out in company with an agreement to give mutual assistance to each other, the claim of salvage by one of them was rejected altogether.

The Henry, 1 Edw. 192.

⁷ *Raikes*, 1 Hag. 256.

The several statutes are 16 Geo. III. c. 5; 19 Geo. III. c. 67; 33 Geo. III. c. 66; 43 Geo. III. c. 160; 45 Geo. III. c. 72, and 48 Geo. III. c. 132. For cases on these statutes see *L'Actif*, 1 Edw. 185; *The Sedulous*, 1 Dods. 253; *The Horatio Nelson*, 6 Rob. 320; *The Gage*, 6 Rob. 320; *The Lambton*, 1 Dods. 5(n); *The Lord Nelson*, 1 Edw. 79. War-salvage does not exclude a further claim for civil salvage in respect of services of another kind rendered to the captured vessel.

duty of the Court. The principle indeed is evident, viz., that all shall participate in the benefit who have effectively contributed to the result. Still, the application of the rule, and more especially the assigning of the several *degrees* of merit, must necessarily be confided to the discretion of the Court. A few examples will best indicate the circumstances which guide and influence its judgment. A ship, water-logged and abandoned, was discovered and taken possession of by a sloop-of-war and a transport. By the joint exertions of the two she was finally, but with great difficulty, brought into port. In deciding upon the salvage, Lord Stowell (then Sir W. Scott) expressed himself thus:—"The only question is respecting the apportionment between the salvors of the sum so allotted. Now the king's ship is, I think, to be deemed the principal salvor, the commanding officer of the ship having presided on the occasion, and given the necessary directions as to the best and most efficacious mode of saving this property; but it must at the same time be taken into consideration that the chief part of the labour lay upon the crew of the transport. In order to make an equitable division between the parties entitled, it appears to me that some reference should be had to the number of persons on board each of the ships." His lordship then states that the crew of the transport consisted of thirty-six men, and that the number of men on board the king's ship was probably from ninety to one hundred and twenty; and directs three-fourths of the salvage money to be paid to the commander, officers, and crew of the *L'Espiegle*, and the remaining one-fourth to the master, officers, crew, and *owner* of the transport vessel.¹

The captain of a post-office packet, having fallen in with an American ship in the last stage of helpless distress, inquired of his crew which of them were willing to go on board, and undertake her preservation. With the exception of one man, all expressed their readiness, and the mate and a certain portion were accordingly sent on board, and succeeded in bringing the vessel safe in. The value of the property saved was about 1900*l*. In the suit for salvage, an exclusive right was set up by the mate and his detachment, by whom the service

¹ *L'Esperance*, 1 Dods. 46.

was actually performed, and on the other hand a claim of participation was made by the captain and the remainder of the crew, as also by the owners of the packet in respect of stores applied to the distressed vessel ; and on this point the Court, after awarding 800*l.*, adjudicated as follows :—“ The next question is amongst whom and in what proportion this sum shall be divided. There can be no doubt whatever that the claim of the captain of the packet is well founded, for he is the life and sole of the whole business. His right to reward is indisputable, and I shall give him the sum of 100*l.*, to which I think he is justly entitled as a sort of *flag eighth*. With respect to the contest which exists between those who went on board the distressed vessel, and became the immediate instruments of saving her and those who remained on board their own ship, I confess I can see no sufficient ground for making a distinction between them, and consider it but fair to hold that they are all equally entitled to be rewarded.”—“ As all of them concurred in their readiness to go, they are all equally deserving of reward. The mate also is entitled to a considerable reward for the services he performed, and I shall therefore give him the sum of 80*l.* The rest I shall distribute equally among the crew of the packet, with the exception of the man who refused his services ; and his share, under the circumstances, ought to be given to the carpenter in addition to his own share. With respect to the claim of the owners of the packet, they are certainly entitled to receive the value of the sails and stores which were supplied from their vessel, and also the amount of any other loss or expense which they may have fairly incurred.”¹

In a later case the same learned judge rejected the claim of an officer of the coast guard, who had sent out his boat and men to the assistance of a vessel in distress, but without taking any actual part in person, observing that the claim was quite novel ; that the general rule was that a party not actually occupied in effecting a salvage service, was not entitled to a salvage remuneration ; that the lieutenant had merely *permitted* the men under his command to perform with the boats a salvage service ; and that to acknowledge

¹ The *Baltimore*, 2 Dods. 132.

him as a salvor would be to introduce a sort of prize principle very inapplicable to cases of this description.¹

In a case already referred to,² where the sum of 4000*l.* was allowed, no less a share than one-half was allowed to the *owners* of the meritorious vessel, on the ground that their vessel ran considerable risk by taking on board the valuable articles saved, many of which were of great weight; that the ship was consequently strained, and obliged to undergo repairs; and that she ran the risk of vitiating her insurance by thus increasing the peril of the voyage. In a more recent instance³ 1000*l.* was allowed to the owners of a sealing vessel for loss sustained in consequence of its diversion from its original destination by a salvage service; 1500*l.* to the salvors generally; 50*l.* to the master and crew of a cutter, which had rendered some assistance; and 200*l.* to the captain of the sealing vessel for his particular expenses.

It is unnecessary to accumulate further examples: if it be difficult to extract from these cases a practical rule, that difficulty will not be lessened by adding to their number.

In salvage on recapture, the proportions to be paid to the several salvors are graduated by a fixed scale, and similar regulations have from time to time been made with respect to vessels retaken from pirates.⁴

Questions of great nicety have arisen in cases of joint recapture, as to the right of participation in the salvage, to which, as possessing no present interest, we shall content ourselves with a general reference in the note.⁵

V. As to the parties by whom, and the interest upon which, salvage is payable, it is clear that all which is directly benefited by the service, is chargeable with a share of the remuneration. The only case of difficulty on this head is as to the liability of the freight—as to which the rule is this:—

¹ *The Vine*, 2 Hag. 1.

² *The Waterloo*, 2 Dods. 436. This compensation of owners is an exception to the rule before stated, which excludes all not actually occupied in effecting the service. *The Vine*, 2 Hag. 2. See also *The Salacia*, 2 Hag. 264.

³ *The Salacia*, 2 Hag. 262.

⁴ 6 Geo. IV. c. 49; and see *The Calypso*, 2 Hag. 209.

⁵ *Bellona*, 1 Edw. 63; *Wanstead*, ib. 268; *Le Niemen*, 1 Dods. 16; *La Belle Coquette*, ib. 20; *Union*, ib. 346; *The Sparkler*, ib. 359.

that if at the time of the service rendered the right earning of the freight has commenced, and if it have been subsequently earned in fact, then salvage must be paid upon the freight as well as upon the ship and cargo;¹ if otherwise, it seems that it ought not to be included in the estimate of the value saved, nor consequently ought the owners of freight to contribute anything to the salvage. The following somewhat singular case illustrates the nicety of discrimination, which may be requisite in the determination of such questions. A vessel was chartered for a voyage out and home on a time freight, one portion of which was to be paid at the commencement of the service, another at the expiration of a year, and the remainder on the arrival of the vessel and report at the Custom House. The ship was taken and retaken, and salvage was decreed on both ship and goods, which, as well as the expenses of restitution, was paid by the charterer from the sale of the goods. After the return of the vessel, he was sued for the third instalment of freight, which exceeded in amount the sum produced by the sale, and against this demand he claimed to set off the charges which he had thus paid. The Court decided that no part of the *salvage* ought to fall upon the charterer, but that he ought to be charged with a portion of the expense of obtaining restitution; and the decision proceeded on this principle: no benefit accrued to the charterer by the recapture, because the freight exceeded the produce of his cargo, which was still therefore entirely lost to him; there was consequently no ground for charging him with salvage; but the restitution of the goods was *pro tanto* a benefit, inasmuch as by the terms of the charter-party the freight was earned by the arrival of the vessel and report at the Custom House, without regard to the fate of the goods; and consequently to this portion of the expense he might in fairness be required to contribute.²

WE have now completed our review of the various obligations arising directly out of the contract of affreightment, as they affect reciprocally the owner and the freighter, as also

¹ The Dorothy Foster, 6 Rob. 88; the Progress, 1 Edw. 210.

² Cox v. May, 4 M. & S. 152.

of the incidental relation in which they are placed severally toward each other, and jointly towards third parties in respect of average and of salvage. There is still, however, one contingency materially affecting both, which has not yet been considered, and without which the inquiry would be incomplete. We mean the damage or destruction of ship or cargo, or both, by collision with another vessel. The case may be viewed as it regards—1st, the owners and freighters of the two colliding vessels respectively; and, 2dly, as it concerns the mutual relations of owner and freighter of the suffering vessel.

1. Collision must either be an effect of mere accident, or to speak more correctly of that over-riding necessity which the law designates by the term of *vis major*, or it must be occasioned, in part at least, by some fault; so that whatever is not within the first of these categories, falls necessarily into the second. For example, one ship may be driven against another by the irresistible violence of the wind, or current, and this is manifestly a case of accident, or *vis major*. But if the like disaster occur in moderate weather, and in good searoom, there must have been some blundering or negligence. Still, though it may be apparent that there is fault somewhere, it may be impossible to trace it out or fix it with reasonable certainty on either party; and the correct classification therefore will be as follows:—1. Cases in which there is plainly no fault on either side. 2. Those in which fault there must have been, which however cannot be specifically assigned. 3. Those in which the fault not only exists but can be ascertained and inspected; which last head is of course subdivisible into the cases, in which both parties are to blame, and those in which either the party inflicting the injury, or the suffering party, is alone in fault.

Now as to the first and last of these,—where neither party, or the suffering party alone, is in fault,—it is just, and in accordance with the rule of all systems of law, that the loss should remain where it has fallen; and in the case where the party complained against is alone to blame, it is equally undisputed that he is liable for all the consequences of his misconduct. But in the two remaining cases, where both are shown to have been in fault, or where the fault, though it

exists, is inevitable, there is not the same uniformity in the rule.

The common law of England is inflexible in its doctrine, that in the case of a common fault neither party can maintain any action for compensation, and that the loss, however unequally distributed, must be borne as it has alighted. And again, as the law never presumes culpability, and would therefore require from the complaining party proof, not merely that there was fault somewhere, but that there was fault exclusively in the party complained against, before it would condemn the latter to amends, it follows that the result is the same where the fault cannot be ascertained, or brought home by satisfactory evidence. But the maritime law, as administered in the Court of Admiralty, having more extensive powers in the equitable adjustment of litigated interests, proceeds on a different principle. Where there is manifest fault on both sides, it apportions the aggregate damage (equally, it is said¹) be-

¹ It is so stated in a very recent case by the Court of King's Bench (*De Vaux v. Salvador*, 4 Ad. & E. 431) in the following words: "Whenever there is a collision, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two." And this is borne out by the case of *Le Neve* against *The Edinburgh and London Shipping Company*, decided on appeal from Scotland to the House of Lords, in June, 1824, the judgment on which was as follows: "The Lords find that both ships in this case were in fault, and that the whole damage sustained by the owners of the ship *Wells* and of the cargo, which were sunk and lost, should be borne equally by the parties." Nevertheless the writer cannot help entertaining some doubt whether any such positive rule exists in the Court of Admiralty; 1st. Because he does not find any recorded authority of that Court establishing or stating it; 2dly. Because it would not be an equitable rule; and 3dly. Because it is not sanctioned by the received doctrine of the maritime law generally. 1st. As to the authorities: the only case in which the principle is laid down at all is *The Woodrop Sims*, 2 Dods. 85, where Lord Stowell states the rule of law in such cases to be, "that the loss must be apportioned between the parties, as having been occasioned by the fault of both of them." His lordship does not say "equally divided," and the use of the word "apportioned" would rather lead to a contrary inference. 2dly. That such a rule would be most inequitable is plain, because suppose the damage to A. were very great, but that to B. inconsiderable, and that, inversely, the fault on the part of A. were small, and on that of B. most gross, justice would certainly not be done by an equal partition of the whole loss. 3dly. No writer on maritime law applies the rule of equal partition to any case but that of inscrutable fault. Emerigon (*Traité d'Assurance*, ch. 12. s. 4. § 2) limits the general rule of the French Ordonnance to that case alone. The Code de Commerce (Art. 407) expressly so confines it: "*S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égales*"

tween the parties ; and though the other case supposed of an inscrutable, or not satisfactorily proved, fault does not seem as yet to have called for the decision of the Court, yet there can be little doubt that the rule just stated would be adopted, as being in accordance not only with natural equity, but with the law of other countries, and the opinions of enlightened jurists.¹

The real difficulty, however, is not in determining the rule, but in ascertaining the facts upon which it is to be applied. The circumstances of confusion, darkness, or danger under which such disasters commonly happen ; and the strong, and almost overpowering motives of interest, personal vanity, and party feeling which influence the witnesses² on each side to represent the transaction in colours the most favourable to themselves, render the investigation of cases of collision the most perplexing and unsatisfactory which can be brought before a judicial tribunal. In the Courts of Common Law the decision of the fact rests with a jury, and as it is not to be expected that a body so composed possesses in itself sufficient nautical knowledge for judging of the propriety or impropriety of the things done or omitted on the one part and on the other, not only are witnesses examined as to the facts, but experienced men are brought forward to pronounce their opinion upon the facts so deposed. In the Court of Admiralty

portions, par les navires qui l'ont fait et souffert." Pardessus (*Cours de Droit Com-mer.* tom. 3. p. 88, De l'Abordage) states the law thus : " S'il est prouvé qu'il y a faute des deux parts, chacun supporte sa perte. Mais s'il est impossible de dire quel est celui dont la faute a occasioné l'abordage, on estime, en égard à la qualité de chaque navire, et des parties endommagées, le tort qu'ils ont éprouvé, et le prix de cette évaluation, additionné en une même masse, est divisé pour être supporté également par chacun des navires qui se sont heurtés, c'est-à-dire par moitié."

If however the practice of the Admiralty Court be as stated, it certainly deserves the slur cast upon it by the Court of King's Bench, which describes it as "not dictated by natural justice nor (possibly) quite consistent with it."

¹ The objection does not apply to the rule thus limited, because where there is fault, which if ascertainable, would either entirely charge or entirely exonerate one party, it is strictly fair, and, indeed, is the only course which in the imperfection of human means is left open, when the culpable party cannot be ascertained, to divide the whole loss between the two.

² Frequently parties actually interested in the result are the only witnesses of the transaction, and in such cases it seems to be the practice of the Court of Admiralty to receive their evidence *ex necessitate*. See *The Catherine of Dover*, 2 Hag. 145, and the cases cited in the note there.

there is no jury, and the evidence is taken by written depositions, a process far less satisfactory for the eliciting of truth than the *vivâ voce* examination in open Court; but the disadvantage in this respect is perhaps more than compensated by the practice of calling in one or more of the elder Brethren or Masters of the Trinity House as assessors to the bench, by whose judgment on the question of culpability the Court is implicitly guided.¹ It is of course impossible to lay down with any pretensions to accuracy or completeness, rules for determining what is or is not proper to be done under circumstances of such infinite variety. It is sufficient to say generally that a greater degree of caution is required in navigating a channel or river, in quitting or entering harbour, in the midst of other shipping, and more particularly of small craft, at night, in a fog, and other like circumstances of probable hazard; that in meeting, the vessel which has the wind free must give way to that which is close-hauled; that a steam vessel, as being always under command, should in all cases give way²; that, at night especially, no vessel should be moored in the regular track of navigation; that a watch should always be set, and so forth³.

The Court of Admiralty in this as in other matters over which it has cognizance may proceed directly against the property by arrest of the offending vessel, and jurisdiction is given by statute to that Court as well as to the Courts of Westminster Hall, over foreign ships doing damage to British craft in any harbour, port, river, or creek.⁴

¹ The advantage of this course will be evident on reference to the cases of *The Thames*, 5 Rob. 345; *The Woodrop Sims*, 2 Dods. 85; *The Catherine of Dover*, 2 Hag. 145; and *The Shannon*, 2 Hag. 173.

² See *The Shannon*, 2 Hag. 173.

³ Emerigon gives a set of rules for the regulation of vessels under particular circumstances, more especially of entering or quitting dock, which seem to have been adopted into the French law (*Traité des Assurances*, ch. 12, s. 4, § 2.) Paillet on the *Code de Comm.* 407, note f.; Pardessus, *Cours de Dr. Com.* tom. 3. p. 90.

⁴ 1 & 2 Geo. IV. c. 75, s. 32, which declares, "that in every case in which any damage shall be done by any foreign ship or vessel to any British ship or vessel, barge, boat, or any other craft, or any buoy or beacon in any harbour, port, river or creek, and it shall appear on a summary application made to any judge of any of his Majesty's Courts of Record at Westminster, or to the judge of the High Court of Admiralty respectively, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners of such foreign ship or vessel,

The statutes by which the responsibility of the owners is taken away when the vessel is under the conduct of a licensed pilot,¹ and limited, in all cases, to the value of the ship and freight,² apply to damage by collision; and foreign as well as British ships are deemed to be under the protection of the former,³ though it may be doubted whether they could claim the benefit of the latter enactment.⁴

There seems to be no reason why the *cargo* on board the wrong-doing vessel should contribute to make good the damage; if the rule were so, the effect would only be a circuity of action,⁵ but as regards cargo damaged by the collision, although it has been laid down by an authority no less eminent than Valin,⁶ that it has no claim to share in the amount of compensation, yet it cannot be doubted that in this country the right of the freighter to amend

then and in such case it shall be lawful for such judge to cause such foreign ship or vessel, being in any harbour, port, or river, or creek, to be arrested and detained until the master, or owner, or consignee of such ship or vessel, shall undertake to appear and be defendant, in any action which shall be brought for such loss or damage, and give sufficient security, by bail, or otherwise, for all costs and damages if recovered as shall be directed and ordered, by such judge, if it shall, upon the trial of such action or suit, appear that such loss or damage shall have arisen from such negligence or misconduct as aforesaid, and in such action or suit, the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage, and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such action or suit than the production of the order of the judge made in relation to such security."

¹ 6 Geo. IV. c. 125, s. 55; 7 Taunt. 258.

² 55 Geo. III. c. 159.—It has been held however, (in the last case decided by Lord Stowell, *The Dundee*, 2 Hag. 137,) that the limitation extends only to the original claim, and that not only the costs, but in case of unreasonable delay interest also upon the costs, may be recovered beyond.

³ *The Christiana*, 2 Hag, 183.

⁴ The preamble of the statute seems to limit it to British vessels.

⁵ Because if the freighter were compelled to pay, he would clearly have a right to recover it back from the owner of the vessel in which his goods were embarked, subject of course to the limitation of the responsibility. Generally speaking, that statute would bring the various interests concerned into a Court of Equity, which would be enabled to adjust the several rights in that suit.

⁶ 2 Valin, 167—169.

from the wrong-doer would be upheld, and, by consequence, that in cases where the loss was apportioned between the two vessels, his title to participate would also be acknowledged.¹

2. As between the owner and freighter of the suffering vessel, it is clear that if the injury were the result of accident, it is a peril of the sea within the exception of the contract, and must fall where it lights,² and that if it arose from the misconduct of the master of the vessel in which the cargo is embarked, the freighter is entitled to indemnification from the owner; it seems also, that if the fault, though it exists, cannot be specifically attached upon either party, the loss will in that case likewise be regarded, so far as the relation of the owner and freighter is concerned, as a peril of the sea,³ and that where there is *proved* fault on the part of both, the freighter, unless satisfaction be made to him in the apportionment of the damage out of the aggregate value brought into hotchpot, might, on principle, sue the owner for compensation.

¹ This would seem to follow, from the judgment in *Le Neve's* case before referred to, where the cargo lost by the collision was taken into account in the valuation.

² *Buller v. Fisher*, 3 Esp. N. P. C.

³ This, however, is to be received as the conjecture of the writer merely. The question would be whether it was incumbent on the complainant to show that it was not a peril of the sea, or on the defendant to bring it within the exception of his contract by showing that it was a peril of the sea. If the owner is to be considered as an insurer, or as having absolutely engaged to deliver safely, save in the excepted cases, the burden is on him to purge himself of fault;—if the presumption of law, in this case as generally, is, that there is no fault unless proved, then the burden is on the freighter.—*Ergo quære.*

ART. IV.—ON COUNTY RATES.

1. *Treatise on the Magistracy of England, and the Origin and Expenditure of County Rates, illustrating the Present defective Management of County Financial Affairs, the irresponsibility of Justices of the Peace, the existing inefficiency of Parish Constables, and the want of a County Police.* By Edward Mullins, Solicitor.
2. *A Bill to establish Councils for the better Management of County Rates in England and Wales, prepared and brought in by Mr. Hume and Mr. Alston.*
3. *Report of the Commissioners for Inquiring into County Rates, &c. 1836.*

OFFICIAL documents inform us that the money levied in 1833 for Poor Rate and County Rate amounted to 8,606,501*l.*, or more than eight millions and a half yearly; one part, and the larger part of that annual charge, has since that period undergone a rigid scrutiny, and a thorough revision, the *financial* results of which are undoubted, and upon the general consequences of which we will not presume to hazard an opinion, because the question of good or evil is now in the very course of trial, and a parallel question can scarcely, if at all, be involved in the economy of county rates. Unfit, indeed, should we be to approach the discussion of any topic of national or even of local interest, if, in weighing it, we placed only gold and silver in the scale, and decided according to the preponderance of mere metal. Public justice and social happiness, upon which necessarily depends individual comfort, are important ends for the attainment of which money is but one instrument; and any expenditure of the latter which should be absolutely required in order to attain and enjoy the former, would readily be allowed and approved by the public. But though no sum would be too great for the purchase, we should not on that account be content to give any price that may be demanded for them, without inquiring

whether the real thing cannot be had for less. As in the ordinary affairs of trade, so even in political economy, the most expensive article is not always the most genuine. On the contrary, if we apply to a dealer, who from particularly favourable circumstances enjoys a monopoly, or who has a name in the trade because his grandfather, or predecessor in the same line, sold an excellent thing of the kind a century ago, we should probably pay more for it than if we patronized another whose increasing custom depended on the good opinion of a discerning public. In any branch of shop-keeping, or in any department of the executive, implicit confidence in and undue favour to any one creates indifference, neglect, bad work, and high prices.

We have ventured to intrude these truisms because we would not have it thought that we are willing to sacrifice the public good to any plan of economical improvement, or that in examining, adapting, and endeavouring to perfect the machinery, we could for a moment lose sight of the object for the accomplishment of which that machinery exists.

The object of the county rate, and the purposes to which it is applicable, are the following :—

Bridges;

Gaols, Houses of Correction, and Lunatic Asylum ;

Prisoners in Gaols, &c. ;

Prosecutions ;

Examination of Weights and Measures ;

Coroners ;

and various other smaller items of expenditure.

These are purposes of the first public importance, which *must* be accomplished in the most efficient manner possible, whatever the expense may be, because they are essential to the security and enjoyment of life and property ; but we should not on this account be frightened away from an inquiry into the system of management, and the mode of expenditure, provided only that we keep the main object steadily in view, with a determination not only to arrive at it, but to reach it by the most convenient and secure route we can discover.

If on the one hand we resolve not to sacrifice one iota of

the public weal for the sake of a paltry saving, we will not, on the other hand, flinch from the rigid excision of every petty interest which may clog the management, whilst it mars also the economy, of the whole system.

What then is the county rate? by whom is it paid, and by whom spent? It is a poundage rate or assessment upon, and paid by, the occupiers of visible property within the county; it is spent according to the order of the magistrates of the county; and its expenditure is at the close of each year finally and conclusively audited by the same magistrates. Thus the right of discretionary expenditure is vested in parties not identical with or representative of those who pay the money, the same parties are final auditors of their own expenditure, and they are freed from any responsibility whatsoever as to the exercise of their discretion. This is an anomaly in our social and administrative system. Whether in the appropriation of parochial charges or of national taxes, neither the local officer nor the public minister has ever arrogated to himself so absolute a power, or so perfect an immunity from controul. The overseer is recommended to the magistrates out of the body of the rate-payers, and at the close of his year he not only submits the accounts of the poor-rate to the audit and allowance of the magistrates, but the prevalent sense of fair and due responsibility has also induced the custom very generally throughout the country, for overseers to lay their accounts before a general meeting of rate-payers for examination and approval before they are presented for the allowance of the magistrates. There is the same account rendered of the outlay of other parochial assessments. All the rights and liberties of Englishmen hinge upon the principle of the responsibility of the king's ministers to the representatives of the people, or tax-payers, for the expenditure of the national taxes: and that implicit confidence which we will not, under any circumstances, place in any persons whatsoever, however respectable, or however exalted their character, we have hitherto been content to repose in the county magistrates with regard to the disposal of the county rates. It is, we repeat, an anomaly, and an anomaly should never exist if it can be avoided. Now we think no

one will undertake to say that the present bad mode of managing the county expenditure should be continued because no other can be adopted; and it must therefore be allowed that the present mode of management is indefensible. Having thus briefly stated our conclusion, in order to impress it on the mind of the reader, we will examine whether our reasoning can be supported by reference to facts and authorities.

The treatise before us contains a tolerably digested selection from the evidence given before Committees of the Lords and Commons, on the subject of county rates, and with extracts or abstracts, it would appear, from or of whatever has ever been said or written in parliament, at public meetings, in newspapers, reports, books, pamphlets, or letters on the subject; and yet it does not embody the *whole* subject, because from all these sources it has selected only what is said *on one side of the question*. To him who is bent upon discovering nothing but abuses and malpractices in the management of the county rates, this is a valuable text-book;—to him who has already made up his mind that all magistrates are “extortioners and unjust,” and only wants an instance or two in order to satisfy his own conscience or enable him to convert his neighbour to the same conviction, this little treatise contains a very convenient catalogue of—we will pay the industry of the compiler the compliment of believing—all the crimes that can be laid to the charge of justices of the peace. Whatever, therefore, may be our opinion respecting the Bill, to illustrate which this tract is prepared, we must say that a more unfair or unjust compilation we have seldom met with. We believe that the general character of the magistrates is such as to be a peculiarly honorable distinction to this country,—we know that it is so in the many instances which have come under our own observation, and whatever, therefore, may be their aptitude or inaptitude for the discharge of certain of the duties with which they are entrusted, they ought rather to be defended with a favourable feeling than exposed to a partial attack. We cannot, therefore, descend to pander to popular prejudice in such terms as the following extract from the Brighton Guardian, copied at p. 72 of the treatise:

"But the chief source of the increase" (of county rates) "is the love which the justices have of amusement. Idle at home, they are glad of an investigation into a criminal charge; and prosecuting such investigations with more zeal than discretion, they commit a large number of persons to prison, who are never brought to trial. To feed them, expense is incurred; to support their families while they are immured within prison walls, costs money; and to keep them in security, gaols are required, and great sums have been spent on *new* prisons, and *new* houses of correction."

After such an absurdity as this, we fear that our readers will be very shy of assenting to any proposition of a writer who shelters himself beneath such authority. It reminds us of a piece of inductive reasoning propounded in our hearing the other day, by one of the populace, in catechizing a parliamentary candidate respecting the Poor Law Amendment Bill. He declared that this bill was a plot of the aristocracy to get the poor out of the country; as thus,—the law starved them, from starvation they were compelled to become poachers, and by poaching they enabled the magistrates to convict and transport them; and his firm belief was, that the Whigs and Tories had plotted to pass the new Poor Law Act, in order to transport all the poor to Botany Bay.

Again,

"The magistrates generally took care to keep the lunatic asylums full, exercising their local influence over overseers, compelling them to remove the pauper lunatics to the county establishment, and sometimes charging, as in Middlesex, *cent. per cent.* on their cost.

"But these sources of expense are, we apprehend, trifling, compared to that which arises from the zeal of those gentlemen to distinguish themselves in enforcing and administering the law. Within the last fifty years there has sprung up amongst the justices and their friends, an irregular *mania* on the subject of criminal law. Solitary cells and brooding silence, driving into insanity the unfortunate wretches who have pilfered to support a wretched existence, is one of the modern inventions of the refined lovers of correcting man by severe punishment; it is punishing a slight aberration from moral rectitude with the very heaviest calamity which can fall on man. Whether this modern scheme prevents crimes or not, at least it entails great expense on the rate-payers. But that is not

all. Your justice must have a nice classification of criminals; the young must be separated from the old, the male from the female, the hardened offender from the fresh criminal, whom the justice, right or wrong, sends to gaol. He must have tread-mills, too, and rigid inspection, which imply larger premises and more accommodation, and the plain and palpable consequence of the zeal of the justices to commit men to prison is to cover the land with spacious gaols. Gaols rise magnificently in every county town, while the habitations of the industrious poor are wretched filthy hovels, compared to which the justice's gaol is a comfortable abode. With the erection of these *fine structures* come *large fees* to architects, and *large salaries* to county surveyors, and comfortable berths to gaolers, all friends or proteges of the justices, who are as much served by having it in their power to provide for a friend, as if the salaries or the fees went into their own pockets. Formerly the justices made a trade of administering the law; they were shamed out of that, and now it is their amusement. When they made a trade of it, the evils they inflicted were of an undivided nature. They took bribes, and committed wrong for pelf. Now that they make an amusement of it, they do general mischief, and they consign whole classes to gaol, and impose great expense on the counties."

For this beautiful specimen of candid criticism, Mr. Mullins appears to be again indebted to the Brighton Guardian. We have often seen magistrates abused for *not* adopting the American system of solitary confinement; here they are abused for adopting it; and lunatics are confined, and criminals punished, in order to give comfortable berths to gaolers, and amusement to justices! Our readers, and perhaps the readers of the treatise, will be surprised to find how many Neros and Caligulas we have spread over the country.

We are sorry to say that we could furnish a few more extracts of a similar character, but these are sufficient to warrant the remarks we have made. Notwithstanding the terrible array of offences marshalled against them by Mr. Mullins, we believe that the magistrates of England are, on the whole, very respectable specimens of humanity.

But to proceed to facts and authorities: The county rate is an assessment upon the occupiers of visible property within the county, made by the justices of the peace assembled in quarter sessions. The assessment is made thus:—The overseers of each parish make a return of the value of the rate-

able property within that parish; the aggregate amount of these returns forms the whole rateable value of the county. It is a very easy problem in arithmetic, to ascertain what a farthing or a penny rate on this whole value will produce, and according to the exigencies of the county, some such general rate is made by the justices. The order thus defining the poundage of the rate, is handed over to the clerk of the peace, who calculates what are called the estreats, or the proportionate amount to be estreated or collected from the different parishes within the county, according to the returned value of each parish. This calculation consists only of so many questions to be worked in the simple rule of three. If 100,000*l.* (the whole rateable value of the county) yield 1500*l.*, what will 2000*l.* (the value of one parish) yield, and so on through the whole of the parishes. This is evidently so straightforward a process, that the county rate for any county in England might be divided in proper proportion amongst the different parishes within that county by any tolerable accountant in a single day, and yet we have before us official documents which show that in a district, certainly not the worst managed in England,—we believe better managed than most other counties are,—and in this favoured district we find that in 1829, and in other years also, a charge was made by the clerk of the peace, and allowed by the justices, of 358*l.* 6*s.*, “for calculating two estreats,” this of course being in addition to his fixed salary, to his county bill, to his disbursement bill, and other incidental charges. Attention was in this instance called to the general county expenditure, various important savings were effected, and amongst others we find, that in 1835 the clerk of the peace’s charge for precisely the same business of calculating two estreats, was 105*l.*, being a reduction of 250*l.* per cent.; and in our humble judgment, about one-tenth part of the latter sum would be a fair allowance to a competent accountant for the calculation. When this important, and it would appear very difficult, labour of dividing the whole county rate amongst the several parishes therein, is accomplished, precepts are issued to the high constables, directing them to collect from the overseers of each parish, the amount charged against them. This amount is paid by the overseers, out of the poor rate, to the high con-

stable, who remits it to the county treasurer. For this intricate and onerous duty of forwarding mandates to the overseers, and for being the medium of remittance between them and the county treasurer, the chief constables appear to have been remunerated by a poundage on the county rate of about 4l. per cent. in addition to their other charges for "various business," and for "surveying weights and measures." There may exist some sufficient reason for making the county rate pay this heavy toll for the privilege of passing through the hands of the chief constables; but it is utterly beyond our feeble comprehension, and it would appear to us more simple, more economical, and quite as effectual, for the orders to be sent direct from the clerk of the peace to the overseers, and the money paid by the latter direct to the county treasurer.

The overseers, as we stated before, pay the parochial proportion of the county rate out of the poor rate in their hands, and the amount of county rate, therefore, charged to each parish, is paid by each rate-payer within that parish, in fair and equal proportion, according to their rateable property therein. But *as between the different parishes in a county*, is the county rate fairly and equally divided? So far from it, that nothing can be more absurd than the inconsistent disproportion which exists. Mr. Mullins explains that the valuations now acted upon in the different counties are not uniform in their principle; if, however, the valuation in one county be on the property tax, in a second, on the actual value, and in a third, on the 12 Geo. 2, c. 29, it can be of no practical consequence if the different parishes in each of those counties concur in adopting the same principle of valuation. But the mischief is, that the county rate being divided to the parishes of the county, according to the value of property in each as assessed to the relief of the poor, the same principle of valuation is not adopted in each of the parishes within the same county. Every one of these parishes is quite independent and free to exercise its own discretion as to the mode in which it shall assess its local taxes. The overseers' prescribed duty is to "raise by taxation of every inhabitant and occupier competent sums for and towards the necessary relief of, &c.," and they are at liberty to raise such tax by whatsoever poundage they may think proper. One parish thinks two-thirds of

the annual value a very convenient amount to levy upon, a neighbouring parish prefers one-half of the annual value, and a third parish calculates its rate on two-thirds of the value of buildings and three-fourths of the value of land; upon the rateable value of each parish ascertained in this diverse mode of calculation, is the county rate divided amongst them; and, therefore, as Lord Wynford truly enough observes, the county rate "is, as every one knows, a most unequal burden," though the several statutes respecting the same do very properly determine that such rates shall be assessed and levied "fairly and equally," according to the "actual annual value" of all property. Persons unacquainted with the subject will be surprised to find that a large annual amount could for any number of years have been collected in so absurd and unjust a manner. But the absurdity and injustice does not end here! For not only are the rateable values of the different townships calculated in diverse modes, but at *divers times also*. One parish, for example, may pay on half the rateable value ascertained thirty years ago, and another parish in the same county on four-fifths of the rateable value ascertained by a survey just completed. The overseers of every parish may have a new valuation made, or continue to act on the old one as they please, and they have several inducements to adopt the latter alternative. The law, strictly speaking, does not allow them to charge the parish with the expense of a new valuation; it is a very troublesome matter to occur during any one's year of office, and its effect would in all probability be to increase the amount which the parish would have to contribute to the county rate. Such facts as the following are therefore almost necessary consequences. Sir Eardley Wilmot, chairman of the Warwickshire quarter sessions, says, in reply to a question of the commissioners, "Leamington pays the same rate now as it did before it became enlarged as a watering-place. There are now 7000 people in it." The Rev. Mr. Yeatman, a magistrate for the county of Dorset, states in his evidence before the Committee of the House of Lords, that in that county seven towns and parishes evaded on eighteen rates per annum (being the amount of the county expenditure on the proposed new rate) 683*l.* 1*s.* 5*d.*; that twelve towns evaded on the above eighteen rates 976*l.* 14*s.* 1½*d.*;

that forty tithings evaded on the eighteen rates 1964*l.* 12*s.* 10½*d.*; and that 222 tithings out of 404 are overrated and oppressed by the present system of assessment. On this gentleman's motion it appears that the Court of Quarter Sessions for that county unanimously resolved that the rate was unequal and unjust. In the county of Lancaster the effects of a new valuation are very remarkable, in consequence of the recent rapid increase of many manufacturing towns in that district. The last valuation for that county, we learn from Mr. Mullins's Treatise, was made in 1829, the valuation upon which the county rate was before levied being taken from the property tax in 1814, previous to which there had probably been no alteration for 200 years. The cost of making the last valuation for Lancashire, in 1829, was only 917*l.*; before that year the amount of property assessed was 3,000,000*l.*, in that year it was 4,214,634*l.* Even this valuation, however great the improvements which the annexed table shows it to have effected, must be considered as only an approximation to the truth, inasmuch as it was made from returns of the overseers, many of which were very inaccurate; and in numerous cases there was an increase made on the returns, from one-third and upwards, without any subsequent appeal against the increase. The following table shows the increase of rateable value in eleven towns in Lancashire, between 1814 and 1829.

	In 1814.	In 1829.
Preston . . .	£34,936 . . .	£80,984
Burnley . . .	8,643 . . .	15,879
Blackburn . .	37,624 . . .	52,073
Liverpool . .	584,687 . . .	751,126
Charlton Row .	19,484 . . .	66,445
Cheetham . . .	8,529 . . .	24,090
Salford . . .	47,910 . . .	100,068
Hulme . . .	9,359 . . .	19,678
Broughton . .	5,044 . . .	14,528
Ardwick . . .	11,097 . . .	13,084
Pendleton . .	16,425 . . .	26,835

It should be recollected, also, that between these two periods these eleven towns, together with all the agricultural districts of the county, which were more stationary in their value, had

been contributing to the county rate *in proportion to the value affixed in 1814*. Even since 1829, it is said, that in Liverpool alone there has been from 30,000*l.* to 50,000*l.* a year of new property erected and *not yet assessed*. The result, as stated by Mr. Mullins, is, "That the towns which have increased during the last fifty years must be gainers to a considerable amount by the present inequality of the county rate. E. B. Portman, Esq., in his evidence before the committee, mentions the case of a small parish paying a greater amount of county rate than a large town; and instances a very small agricultural parish paying a larger county rate than the flourishing town and borough of Lyme. It is in evidence that the town of Weymouth does not contribute a single sixpence towards the payment of the county rate!"

In the West Riding of Yorkshire a new valuation has been completed, with results quite as satisfactory as in Lancashire. The Commissioners on County Rates state that,

"In both Lancashire and Yorkshire, owing in part to the praiseworthy liberality of the great commercial towns, the new valuation has been well received throughout the county and riding respectively, and no appeals have been brought against it; the result is, that Leeds, in Yorkshire, where a new valuation has taken place, occasions to the riding an expense of 2,947*l.* and contributes 4,672*l.*, while Birmingham, in Warwickshire, where there has been no new valuation, furnishes about *three-fourths of the prosecutions*, and contributes little more than *one-fourth of the rate*.

"This inequality is explained, when we perceive that in Warwickshire the amount levied upon the land for poor's rate and county rate in 1833 was 107,142*l.* 18*s.*, and upon mills and factories, *not more than 2,720*l.* 9*s.** Again, in Leicestershire, a manufacturing district, the amount levied upon the land in the same year was 108,330*l.* and upon mills and factories only 783*l.* 2*s.*"

The same Commissioners, in their Report on County Rates, June, 1836, say,

"Supposing a general valuation of any county for the purpose of the county rate to be once correctly made, it is nevertheless subject to rapid derangement. The value or rateable ability of each parish fluctuates from time to time by the creation, extinction, improvement, or deterioration of properties, and particularly by the effect of inclosures. Considerable changes of this description are said to be usually perceptible in the course of seven years. Under

such circumstances, supposing the general valuation to remain uncorrected, the pressure of the charge, as between the different parishes in the county, will become unequal. The general valuations should therefore be frequently renewed; but in most parts of the kingdom they are allowed to remain for long periods of time without alteration. From a statement annexed to the Report of the Select Committee of the House of Commons on county rates, it seems that there are only nine counties in which a valuation has been made within the last seven years; in eight the date of the existing valuation is not known; and in five it appears to be above one hundred years old."

The same Report adds, with respect to the recent valuations of the West Riding of York and the County of Lancaster, that

"Their effect has been to make the large towns contribute in a more just proportion, and greatly to relieve the agricultural interests; though in other counties the result might probably be less striking, we have no doubt that a similar course would be attended with advantage in most other parts of the kingdom; and that in *every instance* the expense of valuation would be *more than* compensated by the amount of benefit derived. We think the measure of periodical valuations should be made imperative; for it is obvious that those who have the advantage of being rated too low under the existing valuations will always be opposed to their revision."

The want of new valuations appears therefore to be very much to the prejudice of the agricultural districts, where the property of the magistrates usually lies, and therefore very much to the prejudice of the magistrates themselves. Mr. Mullins, or the persons from whom he quotes, when they assert that magistrates did *this*, or neglected *that*, from certain odious motives, should also in justice have admitted that the magistrates in this instance neglected to have new valuations periodically made in order that they might have the gratification of paying a larger proportion of the county rates out of their own pockets! A new valuation every two or three years would have furnished additional employment for their protégées, and have been a relief to themselves at the same time. The truth is, that magistrates have very often been negligent, but not so often wilfully and designedly wrong; to alter and amend any existing state of things requires care and trouble, and this they were unwilling to encounter. Admitting, as we do, that magistrates do not execute in a satis-

factory manner, and that they are perhaps unsuited to discharge some of the duties with which they are entrusted, we are glad of this opportunity of explaining that all their errors cannot justly be attributed to the influence of self-interest.

Mr. Mullins copies in detail the mode in which Mr. Birchall, deputy clerk of the peace for Lancashire, accomplished the new valuation of that county at so small an expense, and the mode in which Mr. Hinxman, a land-surveyor, proposed to undertake a new valuation of Dorsetshire, to be completed within the year for 1,500*l*. Without following him through these details, we will briefly state that in our opinion the legislature ought to compel all parishes to be rated for the relief of the poor *on the same principle of valuation*, and the most simple would be on the full annual value, or in other words on the net rental, and this might be left to the Poor Law Commissioners to require, who should also take care that new buildings as they arose should each year be placed in the rate at their fair value, that any alteration in the description or value of property, according to time or circumstances, should be noticed as it occurred in the next new rate, and that the overseers of every parish should once in each year send a copy of the poor rate for the time being to the clerk of the peace or other person officiating as clerk or secretary to the parties having the management of the county rate. Due precaution being thus taken to keep the value of each parish up to and even with the march of improvement, the amount of the county rate might still with most convenience be received from the overseers of the different parishes out of the poor rate, as proposed in the 58th clause of Mr. Hume's bill. Whenever the managers of the county rate had cause to suspect the value returned from a particular parish, they might exercise their authority by sending a surveyor to make an actual survey and valuation of one or two selected specimens of each class or description of property within that parish, and compare his value with that returned by the overseers; and if they saw good reason for so doing, increase the county rate in that particular instance, and leave the overseers to try the test of an appeal.

Besides the matters of economy already mentioned, we believe there are various other items of county expenditure

which need rigid investigation, and are susceptible of great retrenchment. The salaries and profits of the officers employed will not, we believe, always be found duly to correspond with the duties performed by them; we say, "and profits," because the mischievous principle appears to have crept in, of allowing various of the officers to make out bills against the county in addition to their regular salaries; the salary should be a fair, even a liberal one, but it should form the whole remuneration. Unfortunately in some county accounts which we have now before us, the salary of one or two of the officers forms the *smallest item* in the aggregate of their emoluments. We are confident that the work is not done better on account of high payment. We believe it is done worse.

Under the head of prosecutions occurs a heavy charge on the county rate, which is in many counties capable of much reduction. In the district to which we have before referred, and of which we have some personal knowledge, the county accounts were some ten years back or thereabouts annually audited by the magistrates *with closed doors*, and the printed statement of the accounts was not allowed to find its way into the hands of any one but the magistrates. The printer dared not to sell it to any one else, and the ratepayers had really no means whatever of ascertaining in what manner their money was spent. This is still the case in many counties, but in the district to which we refer (the affairs of which we consider to be more than ordinarily well conducted), the magistrates, in consequence of a memorial presented to them from several large parishes, determined to audit the accounts in open Court, and to permit a copy of the accounts to be purchased by any one who might choose to buy it. The consequence of this publicity, which necessarily banishes indifference and induces vigilance, was a very material saving in the county expenditure. The reduction of the before-mentioned charge of the clerk of the peace for calculating estreats from 358*l.* to 105*l.*, if not *propter hoc*, was certainly *post hoc*. We quote from a Report of the Finance Committee, subsequently appointed by the magistrates of the district referred to:—that "the chief constables' allowances for collecting the estreats were considerably reduced;" that "the

magistrates in their several districts are recommended to use the utmost vigilance in checking the abuses of constables, who are in the habit of inducing those prisoners having fines to pay, to withhold payment until they have arrived at the House of Correction, in order that constables may receive conveyance money:" that attention is called to "the stationer's bill, being excessively high, and many items charged which are highly objectionable:" that "they find a great original outlay and a large annual expense in the court-houses, and conceive that a more than adequate number has been already provided, and trust, that whatever accommodation may be furnished at those belonging to the county already established, no new ones may be unnecessarily built, nor any future grants be made for the improvement of those not belonging to the county:" that "a considerable saving might be effected by an adjournment of the grand jury" as explained in the report: that the average cost of prosecuting felony cases at the assizes was in 1821, 44*l.* and in 1831, 37*l.*, and they recommend, that "an order be given to the treasurer to refuse payment of any of the following charges," enumerating five different items of expenditure, which would appear to have been allowed and paid in previous years.

This, as we mentioned before, is and has long been one of the best managed districts in England; publicity was given to its accounts about ten years ago, and since that time the average expense of prosecutions at assizes has been reduced from 44*l.* to 37*l.*: various other important retrenchments have been effected, and still more are contemplated, as stated in the above Report of the Finance Committee of Magistrates; and we beg leave to add, that the general efficiency of all the departments maintained out of the county rate has been fully supported, in some cases increased.

We trust we have now made it tolerably apparent that there is ample room for economical improvements in the general management of the county rates. By what means then will these improvements be best effected? Our attention has been just attracted to the report in the newspaper of Lord Wharcliffe having explained at the Pontefract sessions last week, that the whole amount charged upon the West Riding of Yorkshire, on account of the new buildings at York Castle, was

111,000*l.*, being in the whole only 15*d.* on the West Riding value, and that the payment of this had been spread over a period of eleven years; this explanation was of course intended to convey some consolation to the rate-payers. His lordship is generally and justly considered one of our very best magistrates, and yet he tries to comfort the rate-payers by informing them that the expenditure is only to each individual 15*d.* in the pound, paid in eleven years, or rather more than 1*¼d.* in the pound each year. Much the same might be said of any public expense, even the most flagrantly extravagant that has ever been visited with public indignation; that particular charge, be it great or small, might appear to be only slightly felt by each individual, though our experience has taught us that no payment, however small, can truly be said to be slightly felt by the greater number of individuals forming the population, for every sixpence taken out of the pocket of the labouring man, deprives his family of some little comfort which the superior classes would not improperly consider amongst the necessities of life. These charges also, if singly small, are numerous and come in various shapes, and are in the aggregate no slight burden: and when we see a magistrate stating in explanation of an enormous outlay (whether judiciously or injudiciously expended we know not), that it is only 15*d.* in the pound to each rate-payer, and therefore really a trifling matter, we are confirmed in our previous conviction, that the management and audit of the county fund should be entrusted to persons more by habit fitted to transact pecuniary matters with care and efficiency, elected by, and therefore possessing the confidence of, the rate-payers, and responsible to those who pay the money for its proper outlay, men in fine who would possess every qualification now possessed by the county magistrates, with much peculiar and additional fitness.

The following is a brief outline of Mr. Hume's plan, as embodied in his bill: That his majesty shall appoint commissioners to divide each county into "county wards" of one or more parishes, and to fix the number of councillors to be elected by each ward, and also to fix the number of auditors of county accounts to be chosen, and what wards shall be united for the purpose of choosing them. The councillors to

be elected by all the rate-payers of the wards, one-third of whom to go out of office each year, but to be immediately re-eligible; the only qualification required for a councillor, that he be one of the rate-payers. These councillors are to meet at least once a month, and are to elect out of their own number an executive committee to conduct all such affairs as may be committed to them during the intervals of the sittings of the council; and the council may order an allowance to each member of the executive committee to defray all expenses consequent on the execution of the duties of such office. All business appertaining to the assessment, application, management, or expenditure of the county funds, is to be transacted publicly in open council or committee. The council are authorized to appoint a clerk, treasurer, collector, and such other officers and servants, and at such salaries, as they may think requisite; "the treasurers, however, of every county, and all other officers or servants appointed by the justices of the peace for county purposes at the time of the commencement of the act, to hold and enjoy their respective offices and employments, together with their respective salaries thereunto annexed, until they shall be respectively discharged or removed therefrom by the council." The treasurer is to submit his accounts quarterly to the auditors, who are to report thereon to the council, and a copy of the accounts so audited is to be transmitted to the Secretary of State, and an abstract of them to be sent to the overseers of every parish. The *financial* functions of justices of the peace, *i. e.* their power of raising and spending county rates, to cease, and to be transferred to the council. The council have authority to make and levy county rates, either by a distinct rate and employing their own collectors, or (which we think will be found a preferable plan), by sending a warrant to the overseers of each parish, requiring payment to be made out of the poor-rate of the amount therein specified for county rate direct to the county treasurer, whose receipt is to be their acquittance, with a provision for the levy of the county rate in extra-parochial places. The council are also authorized to appoint "police constables, or peace officers;" and to recommend fit persons, to be appointed by his majesty at his pleasure justices, of peace for the county, and such justices shall not need any qualification by estate. Petty

sessions of the magistrates within each ward are to be held each quarter, for the special purpose of determining appeals by overseers, or others within the same ward, against the county rate, fourteen days' notice of such appeal having previously been given to the clerk of the council.

We hesitate not to express our approval of the appointment of a county council out of the body of the rate-payers for the financial purposes specified. The system of placing the county funds under the irresponsible controul of the county magistrates, is, as we before stated, an anomaly in our social system, and quite an *unnecessary* anomaly. The rate-payers at present are not only without a voice in voting the expenditure, and without any means of appealing against any part of it which they may think injudicious (the order of the magistrates being conclusive), but they are, moreover, in many counties without any knowledge whatever of the manner in which their money is spent. Some gentleman, whose name we forget, asserted in parliament lately, that the magistrates ought to have the management of the county rate, because they were in reality the parties who paid it. So far from this being the case, in counties which contain large manufacturing towns, it is stated in the Report of the Commissioners on County Rates, that since the new valuation in the West Riding of Yorkshire: "Leeds occasions to the riding an expense of £2947, and contributes £4672;" and in other more purely agricultural districts, if the magistrates really pay the county rates, they will of course have an influence in the council corresponding to their property and influence in the county.

We can scarcely admit that, on plunging at once into a new system of investigating county expenditure, it would be prudent, in the beginning, to make all the rate-payers equally entitled to vote in the election of councillors, though we will not venture to suggest at what point the limit of elective privilege should be fixed. With some precautionary limit as to the constituency, we would agree in not requiring any other qualification for a councillor than that of his being a rate-payer. As the council will consist of persons in whom the electing rate-payers express their own willingness to confide,—as the accounts will be put into the hands of the public,—as

there will be the right of appeal to the magistrates—a body distinct from that exercising the power of expenditure; and as the electors will on every fresh election be enabled to express their opinion respecting the manner in which the councillors have discharged their duty, we think it would be unnecessary, and we are sure it would be inconvenient, to have the discussions of the council carried on in public. An annual instead of a quarterly audit would also, we conceive, be sufficient, and would indeed convey a more accurate idea of the annual charges than if split into unequal quarterly sections; unequal, because a variety of payments for the whole year would occur in one or other of the quarters. The requiring the payments to be made direct from the overseers to the county treasurer is a great improvement upon the present system. The principle being, if we apprehend it rightly, to vest the *financial* administration of the county in the council, apart from all judicial functions, we suggest that it would be better that the council should not interfere in the appointment of constables, or in the recommendation of magistrates, but confine their attention to the pecuniary department. They would always have the same power with respect to magistrates and constables, and other functionaries of the law within the county, which the House of Commons possesses with respect to the ministry; viz., that of diminishing or stopping the supplies, which would be a sufficiently effectual method of signifying their wishes on any particular subject. We object also to the petty sessions in each ward, for the special purpose of determining appeals against county rates, because we see no use in creating new machinery when the old will as well, or better, answer the purpose; and we think it preferable that appeals should be determined by the magistrates of the county at the general quarter sessions, than by the magistrates resident in the particular district out of which the appeal arises. The county magistrates would then form the ultimate court of appeal in all disputes respecting county rates.

We have endeavoured, in considering the subject, to free ourselves from the influence of any prejudices either for or against the magistrates on the one hand, or for or against Mr. Hume on the other; the real merits of the question have

been the only object of our inquiry, and the public good our only admitted guide; and it is therefore quite possible that our remarks may not entirely satisfy any *party*. Having suggested that, in our humble judgment, the council ought to have no other concern with the constables but to determine respecting their payment, we leave the question of a rural police for future consideration.

G

ART. V.—INTERPRETATION OF LAW.

THE KING V. THE POOR LAW COMMISSIONERS.

1 *Nev. & Per.* 371.

VARIOUS attempts have been made to call the attention of the legal profession to the necessity of a systematic study of the principles of verbal expression and interpretation, more especially, of course, as far as those principles apply to law. It might have been reasonably hoped, that the attempts would have met with more success; for the whole body of every system of positive law is contained in verbal expressions; and the effect of the law, in every possible or conceivable instance, obviously depends on such expressions, or, what is the same thing, on the construction to be given to those expressions. Every civil right and obligation is either directly defined by the words used by the legislature in its acts, or is involved in the expressions in which the general rules of the customary law are contained, or in the terms by which men express their intentions in insuring voluntary obligations. In fact, a lawyer's whole occupation is to ascertain how far each individual case is included in some expression of the general law, or to ascertain the effect of the expressions used in private instruments, or in oral communications.

It has always been admitted that rules of interpretation are necessary, and maxims are constantly cited in legal discussions, as determining the construction in the particular case in question at the time. These maxims have, however, never yet been collected in a systematic form,—their exact

meanings have rarely been defined, or even examined,—and their mutual relations one to another, whether in any instances they conflict, what limitations they require to be made consistent, what extension they require, or what further rules may be necessary to render the doctrines of construction complete, or whether they already contain in the aggregate a complete system of interpretation, are questions which have never yet been made the subject of anything like complete or exhaustive inquiry.

The reason for the neglect is clear. The want of the inquiry is not suspected. If the necessity of a clear understanding of the principles of interpretation be urged, the recommendation is regarded as common-place—like a critical essay in praise of virtue, or a rhetorical exhibition in favour of what nobody impugns; and the natural consequence is, the tedium of the hearers on the jarring question—*Quis vituperavit?*

Yet that the law is uncertain is a proverb, not yet proved to be false; and this uncertainty does not alone prevail because the law does not exist, or because its provisions cannot be discovered, among the statutes or in the other depositories of our jurisprudence, but because the meaning of that law can so seldom be evolved with certainty from the expressions in which it is enunciated.

As far as the common law is to be found in the breast of the judges, in their reported decisions, or in institutional books, the expression of the law is exclusively the work of lawyers, and good or bad they, as a body, must alone answer for the form in which it is expressed. So with respect to private legal instruments, the expression of the vast majority of these is left wholly to the lawyer; and although the expression of the statute law cannot be entirely charged on lawyers, nor the wording of some few written instruments, nor the oral communications of individuals on which questions of right arise, yet it is the peculiar province of lawyer, both as lawyer and as judge, to ascertain the meaning of these; and the amount of uncertainty in both the expression and interpretation of the first of these classes of evidences of the law, and in the interpretation of the second class, obviously depends upon the rules of expression.

terpretation which the lawyer or judge may be prepared to apply.

What is wanting to compel a systematic study of the principles of these rules is not an encomium on their utility—their utility will be readily admitted—it is evidence, clear and incontestible, of the general neglect of these principles, which is now scarcely suspected ; and evidence, equally clear and irresistible, of the uncertainty of the law, and of the prejudice to the usefulness and consequent character of the profession and of the judicature, which ensue from that neglect.

It is proposed, therefore, to collect, in a series of articles, the rules of expression and interpretation in an orderly method, and to accompany them with an exposition of the principles on which they depend, by which they must be connected into a consistent system, and by which they must be restrained from mutual interference. But it is proposed first to show the necessity of all this, by instances of the neglect of such principles. Though the rules of verbal expression by which legal intentions are to be accurately described, and the rules of interpretation by which such intentions are to be correctly inferred from verbal expressions, are so related, that the exposition of both must be proceeded with together ; still they differ in this, that rules of expression contemplate none but perfect expression as their proper object, while rules of interpretation are, in a great measure, necessary to collect the meaning of imperfect or ambiguous expressions. Thus, if the principles of expression were perfectly observed, all those rules of interpretation which seem to collect the intended meaning of imperfect or ambiguous expressions, would have no existence.

Interpretation is therefore the more extensive subject of investigation, and comprises all the doctrine of verbal expression. It is, besides, the more exclusive province of the lawyer and the judge, while the legislature, and the whole of the members of the community, share with him the occupation of giving verbal expressions to their intentions.

Instances abound in the reports of almost every species of excellency and defect, both of expression and of interpretation: in our older reports especially, where all the rules of

interpretation now extant are to be found usually expressed in apt and characteristic maxims,—and where they appear to be constantly present to the mind of the pleader and the judge, by whom they were learned as a necessary branch of liberal education, of which logic, the science which comprized them all, then constituted a most important element. This period, ending with Coke, will, in the course of these articles, furnish many instances of argumentation, as remarkable for the admirable certainty and cohesiveness of the reasoning as for its equally admirable subtlety. It will furnish also its instances of over-refinement in distinction, and super-subtlety of argument: but when the reports are reputed to be worthy of the matter they report, there will be found to be but few instances in which the pleader or the judge appear not to be thoroughly impregnated with the doctrine of these rules. In this period our system of special pleading was perfected, and the foundations of the doctrines of our common law laid and confirmed; our law of real property rescued, as far as possible, by most subtle and consistent fictions and masterly contrivances, from the trammels of feudality and the restrictions of a barbarous legislation, by means of the very doctrines of that feudality and legislation, and the whole put into a form as consistent with the wants of the community, as was possible without the co-operation of a more enlightened legislature. As far as succeeding lawyers and courts are concerned, little has been done but to expound the doctrines of those days with a proportionate diminution of their coherence.

As the old school studies declined, so did the intimate acquaintance with the rules of interpretation; and in the reports from the time of the Commonwealth the rules appear to be less at the command of lawyers and judges; but while the old reporters contained the only legal precedents, an acquaintance still intimate was maintained with these rules, although they now wanted that firm and sure connection in the mind of the lawyers, which was formerly prepared for them by the universal study of logic as a liberal art. From about the time of the Revolution, the more prevalent study of sounder philosophy, especially of moral and intellectual philosophy, superseded the study of logic generally; and as regards legal education, the supply of new precedents daily

rendered the old depositories of our doctrines of interpretation less necessary in practice, and consequently less familiar to the rising generation of lawyers.

The illustrations in the following articles will show a constantly diminishing special aptitude in this respect, just as the general knowledge of the bar may be presumed to have improved with the progress of science and opinion.

It is not, however, for the sake of illustrating these remarks, and of proving that the study of the doctrines of legal interpretation has precisely in the last reported case reached its anti-climax, that the case of the King against the Poor Law Commissioners is selected as evidence of the extent to which a neglect of those doctrines has been consummated.

To beget a conviction of the necessity of an instant reform, it is indispensable to show that the evil to be remedied is at the very instant in operation. This will best be done by selecting the most recent example; and to give assurance that some casual example, different from the usual character of cases, is not chosen, it is proper that a case should be selected of the utmost practical importance as regards the parties interested, and the magnitude of the interests at stake, such a case as would compel the exercise of the greatest vigilance of the judge—a case, also, if such could be found, in which the judges should distinctly profess to have used their utmost care in arriving at a sound decision. To limit the considerations to a very definite limit, it is necessary that a decision on any point of doctrine, only to be established by a multitude of precedents to be sought in many books, should be avoided, but that a decision on some statutory provision, involving no technical doctrine, and where the subject of interpretation is contained in few words, should be sought. It is also desirable that a case should be selected of sufficient amplitude in detail to afford abundant illustration in itself, instead of selecting illustrations from many distant cases, as the latter course would render a description of each case necessary, and would justify a suspicion that defective cases had been selected. As a single judge may fall into a singular and unusual error, whilst many are only likely to do so when the source of error is common to many persons, it will confirm the state-

ment of the universality of the evil in question, if a case be selected decided by four judges.

The case of *The King against the Poor Law Commissioners* is just such a case as satisfies all these conditions. Its importance can scarcely be over-estimated, involving as it does the power to introduce into all the important and populous parishes, having local acts or governed by guardians under Gilbert's Act (22 Geo. 3, c. 83), or by select vestries under Sturges Bourne's Act (59 Geo. 3, c. 12), that mode of administration by which, since the year 1834, the evils of pauperism and the vices of the old system of mal-administration have been so rapidly removed, by which above five millions of a tax, most demoralizing as it was applied, have been directly saved, and incalculably more than that sum diverted into channels for the support of honest and independent industry. The judges distinctly profess to have taken the utmost pains to arrive at a correct conclusion, more especially as one of their number (Williams, J.) dissented from the remainder of the bench (Denman, C. J., Patteson, J., and Coleridge, J.)

It would be obviously improper to select instances of fallacious interpretation from the arguments of counsel, where of course they abound, because counsel, by their position, are compelled to argue for one conclusion only, and on one side or other must be wrong in nearly every case. But the judges are in their place for the sole purpose of interpreting the law correctly. No doubt can exist of their intention to do so; and their success in their task is the only sure test of the sufficiency of the existing aids, as now made use of, for the interpretation of the law. It is, perhaps, necessary to state thus much to justify the following strictures on an elaborate and recent decision by living judges, and to avoid the charge of presumption, to which a lecturer on logic recently exposed himself, by specially inviting some of the judges to attend a course of his lectures on that art, urging the great utility which they might derive from the practice of it in the exercise of their high functions.

The following statement of the case, and the remarks upon the decision, are confined to the points which were present in the minds of the judges, as shown by the report, and

none others will be admitted, and no doctrine derived from other cases or other sources than such as the judges were directly cognizant of, and distinctly directed their attention to in their decision; for the object being to examine the way in which the judges proceeded in interpreting the law under their consideration, the fair course is to examine how they dealt with their own premises, not to seek what other premises might be found by which they might have been compelled to arrive at another conclusion.

The case.—The Poor Law Commissioners, on the 26th of April, 1836, issued an order, directing “that the laws for the relief of the poor in the parish of St. Pancras, in the county of Middlesex, should from and after the 11th of May (then) next be administered by a board of guardians, consisting of twenty members.” And the order proceeded to prescribe the mode of election, and the constitution of such board of guardians.

The relief of the poor in the parish was, at the time the order was issued, administered by a board of Directors, elected under a local act, and the persons elected guardians under the order were all members of this board of Directors. These persons, with one exception, refused to act as guardians, contending that the order of the Commissioners was illegal. The question as to its legality was finally brought before the Court on a motion for a writ of certiorari, and the learned judges delivered their judgment in the course of last Hilary term—Denman, C. J., and Patteson and Coleridge, Js. against the legality of the order, and Williams, J., delivering his opinion in its favour.

The order of the Commissioners was assumed to be founded on, and the terms of it are taken from, the 39th clause of the 4th & 5th Will. IV. c. 76 (The Poor Law Amendment Act), and the whole question is, whether the expressions of that clause are to receive an unrestricted or a restricted construction. Before the process of interpretation is examined, it is necessary to observe minutely the expressions of the law which is the subject of interpretation—the premises to which all the conclusions must conform. The most material considerations arising on each enactment will therefore be pointed out in notes as

each clause of the act is cited, and this will, in some measure, usefully exemplify the practice of reading distinct enactments, previously to the institution of any comparison between them for the purpose of ascertaining and interpreting their combined effect.

The 39th section enacts,—

“ That if the said Commissioners shall, by any order under their hands and seal, direct that the administration of the laws for the relief of the poor of *any single parish* should be governed and administered by a board of guardians, then *such board shall be elected and constituted, and authorized and entitled to act, for such single parish, in like manner in all respects as is hereinbefore enacted* and provided in respect to a board of guardians for united parishes; and every justice of the peace resident therein, and acting for the county, riding, or division in which the same is situated, shall be and may act as an ex officio member of such board.”

Note.—1st. The *absolute generality of expression* as to the parishes subject to the operation of the enactment—“*any single parish*”—without any words of restriction or exception applicable to any class of parishes whatsoever. This is important, because the decision limits its operation to the least important class of parishes—those, namely, without local acts.—2dly. The *specific description of the guardians* to be elected under its provisions. They are described by every incident by which the guardians to be elected under the act can be described, by every characteristic by which they can *logically* be distinguished from any other class or description of guardians.

They are to be ‘*elected*,’ as in the act enacted—a circumstance distinguishing them from all other guardians;—such a mode of election being stated by the learned judges to be new to the law, and moreover, as Patteson, J., remarks, (p. 390), ‘*a favourite object throughout the act.*’

When elected, they are to be ‘*constituted*,’ as enacted in the act itself for guardians of unions—another exigency which no guardians under a local act are likely to satisfy.

When elected and constituted, they are to have the same authority,—to ‘*be authorized to act in like manner in all respects*’ as provided for the guardians created by the act—another specific character to distinguish the peculiar nature

of the authority¹ which the enactment contemplated for the guardians to be introduced into single parishes.

They are to be 'entitled to act in like manner in all respects,' a character conclusively distinguishing them from all other classes of guardians, who must derive their *title* from some other source at least.

These specific characters, therefore, apparently distinguish the guardians contemplated by this section from every other conceivable class of guardians, and it is most important to bear them in mind, because the decision affirms that guardians differing in every one of these distinctions, adequately satisfy the exigencies of the enactment.

3dly. That the Commissioners merely determine that the laws shall be administered by a board of guardians, and that the Legislature itself, by the very words of the statute, provides as a consequence for their election, constitution, and authority.

This is also very material, because objection is made to the Commissioners being invested with so large a power of de-vesting the local functionaries of their authorities by the erection of new functionaries—an objection which would probably not have been made if it had been observed that the Legislature itself, by its own act, creates the new board, the Commissioners being merely made judges of the occasion for the operation of the act of the Legislature.

The words of this section are admitted to be quite general, and as applying to all parishes without exception. Coleridge, J., observes, "I do not see how it can be denied that the words, *entirely unrestrained as they are, are large enough to extend to single parishes, under whatever circumstances they may be*, and so to authorize the order in question with regard to St. Pancras." Patteson, J., throughout refers to and admits the generality of its terms; and Denman, C. J., calls them "the very large words," apparently with the same meaning.

Such being the "unrestrained words" of the statute, a con-

¹ The *authority* of the guardians under the act is confined, most cautiously, to mere administration of relief, and most sedulously preserved from intermixture of other heterogeneous and distracting functions; and thereby differing in a most essential and marked manner from the anomalous and discordant authorities usually conferred on guardians under local acts.

struction is nevertheless arrived at, restricting the operation of the section so as to exclude from it the parish of St. Pancras.

Of course, nothing can lawfully diminish the effect of these words but a physical or moral impossibility of carrying them either wholly or partially into effect, or the will of the Legislature itself. The first reason does not appear in any way to apply, and we are therefore left to the necessity of establishing that the Legislature intended that the effect of these "unrestrained words" should be limited.

It is obvious, that the evidence of the intention to restrain the effect of terms in themselves unrestricted, should be at least as strong as the evidence afforded by the very words themselves, that the Legislature meant them to have their full sense. Otherwise, the stronger evidence afforded by the words themselves will be overthrown by evidence of a weaker nature. This must be carefully watched. The intention of the Legislature to restrain general words may be indicated in several ways; 1st. Directly, by express exception, limitation, or restriction. 2dly, By the enactment of provisions, which, to have effect, must necessarily interfere to a given extent with the general operation of the general terms.

The first of these ways of restricting general terms by express exception, is that which when adopted affords least room for doubt, either that the Legislature did actually intend to restrain the general terms, or of the extent to which the restriction was intended to have effect. Here the evidence of the intention to restrain being in direct terms, is of as high a nature as that of the intention to enact. When the Legislature adopts this mode of restricting its general enactments, it uses its simplest and most obvious means of effecting its intent, and precludes all doubt. The omission of the easiest, simplest, and most obvious means of producing an effect, is some evidence that the effect is not intended to be produced. But in the present case there is not any express exception on the general words.

The second mode of indicating an intention to restrain a general enactment, namely, by enacting provisions, which to have effect must necessarily interfere to some extent with the full operation of the general terms, is obviously liable to objection. The presumption always is, that what the Legis-

lature directly intends it will directly express. Here, on the other hand, intention is to be inferred—and inferred for the purpose of detracting from the full effect of that which has been directly enacted. Mr. Justice Coleridge expresses the objection to inferential limitations of the direct terms of statutes thus:—

“ It is, in my opinion, so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute; and also that to adhere to the literal interpretation is to decide inconsistently with other overruling provisions of the same statute.”

It is, however, to *this* mode of restricting the ‘unrestrained words’ of the 39th section, that resort is had in the present case.

The obvious cautions to be observed in admitting this inferential evidence of the intention to restrain, are—1st, that it must be established that the provisions must of necessity conflict or interfere to some extent, otherwise both may have effect, without diminishing the effect of either, and all pretext for restraining either fails; 2dly, that the provisions, in consideration of which the restraint is imposed, shall be at least as important in the consideration of the Legislature, as the provisions which are to be sacrificed to them; 3dly, that the inferential evidence to compensate for want of directness, should be itself consistent and unequivocal; and, 4thly, that also to compensate for its want of directness, it should be confirmed by a more general consistency with the residue of the enactment or of enactments *in pari materia*—that it may thus preponderate by accumulation of evidence over the more simple and clear enactment opposed to it.

We are now in some measure prepared to judge how far the generality of the terms of the 39th section can be legitimately restrained by the effects of other enactments in the statute.

It has been stated, that at the time the Commissioners' order was issued, the relief of the poor in the parish of St. Pancras was administered by a board of Directors appointed under a local act.

In the first place, the definition of the word "Guardian," in the 109th section of the Poor Law Amendment Act, is put in conflict with the terms of the 39th section: it is this—"the word 'Guardian' shall be construed to mean and include any visitor, governor, director, manager, acting guardian, vestryman, or other officer in a parish or union, appointed or entitled to act as a manager of the poor, and in the distribution or ordering of the relief to the poor from the poor rate, under any general or local act of parliament."

Note 1. This definition will, of necessity, apply in construing the whole act wherever the word "Guardian" is used *generally*—the exceptions being only where its application is excluded, either by the context, or by a specific description of, or reference to, any particular kind of guardian.

—2. That every officer here mentioned differs in election, constitution, authority, and title to act, from the guardians expressly described as contemplated in the 39th section.

—3. That the words "any other officer *entitled* to act as a manager of the poor, and in the distribution or ordering of the relief to the poor from the poor rate, under any general act of parliament," accurately describes churchwardens entitled to act as overseers under the statute of Elizabeth—and the words "any officer *appointed* to act, &c." accurately describes the overseer.

—4. That if the existence in a parish of any such officers as are enumerated and described in this definition, be considered to have the effect of superseding the operation of the 39th section, then the "unrestrained words" of that section are restrained so as to exclude every parish having any of the above officers—especially every parish with a select vestry; that is, practically, the section is limited to those parishes only which are so insignificant as to have remained under the simple administration provided by the statute of Elizabeth; precisely the parishes for which, singly, it would be absurd to make use of the provision, or to appoint a separate board of guardians. Further, if the words descriptive of churchwardens and overseers in this definition, and which identify them with

guardians, receive the same application as the word '*director, &c.*' then there will be no place maintaining its own poor, or subject to the operation of the act, in which there are not already '*guardians*' under the definition—thus the unrestrained words of the section, '*any parish,*' would either be restrained to the class of parishes to which its provisions are quite inapplicable, or else to '*no parish at all.*'

Nevertheless, it is the first, and apparently the chief argument, that there being a board of Directors in St. Pancras, and such Directors being made by the definition identical with guardians, the reason for appointing guardians under the section is superseded,—although these directors were *elected* under the provisions of the 1 & 2 Will. IV. c. 60, (Hobhouse's Act), by a mode of election utterly different from that characterized by the judges as "a favourite object of the Poor Law Amendment Act"—selected under the provisions from among the select vestrymen, thus again differing in qualification from guardians elected under the Poor Law Amendment Act—having, under the "local act," a *constitution* and functions vastly more numerous, differing widely in character and responsibility from the *authorities* and equally in their title to act, from guardians appointed under the Poor Law Amendment Act—and therefore differing in every expressed particular, from the guardians described in the 39th section.

The question is confined to this—Does the general description of guardians in the 109th section supersede, in construing the 39th, the specific description introduced into the body of the latter, and showing the particular kind of guardians contemplated by it?

The remaining arguments used to restrain the effect of the words of the 39th section are drawn from clauses in the body of the act.

The order in which the clauses in the act follow is this—By the fourteen first clauses the Commission is constituted and its functions assigned to it—especially the power of inquiry, a function which properly precedes action.

From the 15th to the 26th section inclusive, the Commissioners have general powers of regulation given to them; but no powers are yet conferred of organising a new system of administration. It is material to observe in examining these

sections, that they have, of necessity, reference to the organisation existing when the Commissioners were to commence their functions—to all the officers then in existence, and whom it might be necessary to direct and control, either generally, or in particular instances, before a new organisation could be introduced, and which organisation may be indefinitely delayed or never completed ; and for these reasons, apparently, and following the natural course of things in the order of time, the power to control existing officers and existing modes of administration precedes the power to introduce new officers and the new system of administration. In this there appears to be consistency, not conflict of principles. *To recognize, and to subject to control* all existing officers in the interval of change from the old state to the new, was necessary—to confirm and establish them, would be to prevent, instead of to prepare for the new organisation, and is obviously a totally different thing. If the legislature had confirmed and established all the officers it subjected to control, its provisions for superseding those officers, wholly or partially, would be nugatory and self-contradictory, and an interpretation to that effect is one to be avoided, even if apparently countenanced by the expressions of the legislature ; but is clearly not an interpretation to be gratuitously assumed.

The sections, amongst those preceding the provisions for a new organisation, to which the judges advert, are the 15th and 21st, which must be referred to, as too long for quotation at length ; but the expressions particularly adverted to and most material are these :—

In the 15th, “that from and after the passing of this act, “the administration of relief to the poor throughout England “and Wales, *according to the existing laws, or such as shall “be in force at the time being*, shall be subject to the direction and control of the Commissioners.”—For executing their powers they are authorised to make and issue all such rules, orders and regulations as they shall think proper for the management of the poor, &c. &c. “and *for the guidance and “control of all guardians, vestries and parish officers*, so far “as relates to the management of the poor, &c.”

In the 21st section, after subjecting the powers under the provisions of certain general and local acts to the control of the Commissioners, it is enacted, “And *all powers* auxiliary

"to any of the powers aforesaid, or in any way relating to the relief of the poor shall in future be exercised by the persons authorized by law to exercise the same under the control and subject to the rules, orders, and regulations of the said Commissioners."

Note, as to these provisions,—

—1. That the intention of these sections to control the administration of the law by existing officers, is clear and distinct, and excludes the possibility of a doubt.

—2. That to control an officer is one thing, and in order to do so, it is necessary to recognize or contemplate his existence.

—3. That to confirm and establish the authority of an officer is another thing; and that the recognition or contemplation of an officer, is not of itself an enactment, or equivalent to an enactment to confirm and establish his authority.

—4. That control of authority is the very opposite of confirming or establishing it, the controlling power being so much subtracted from the power controlled.

—5. That control, as long as it may be necessary, is consistent with provisions for a future and different organization of functionaries. That establishment and confirmation of existing officers is inconsistent with such provisions.

—6. That the above sections relate to *all* parish officers. If, therefore, they confirm and establish all the officers to which they relate, there is no parish in which a new organisation can be introduced; therefore all the provisions for a new organisation are nugatory, and the two sets of provisions contradictory.

—7. That the words "according to the existing laws, or such as shall be in force at the time being," include of necessity the Poor Law Amendment Act itself, and its provisions; and that its provisions, when they come into effect, will be the laws for the time being, and the object of the Commissioners' functions.

—8. That in like manner "*the persons authorized by law to exercise powers relating to the relief of the poor,*" must extend to guardians when appointed under the act itself; that these guardians, however, can never come into existence, if all existing officers are confirmed by those words in their former legal authorities.

—9. That to assume that these words *confirm and establish* all existing officers, is to add to their controlling effect, which, without the addition, is a most necessary and reasonable effect, distinctly deducible from the words. And that the effect of confirming *all* existing officers in their powers thus added, would render all the provisions for new functionaries to exercise the same powers inoperative; and as especially regards the 39th section, is to restrain, and in fact to neutralize, direct and general terms, by adding, gratuitously, to the effect of provisions which are amply satisfied when the mere power of control is conceded, during such a period as the functions may remain vested as at the passing of the act, and permanently, when these functions are transferred to the officers whom the act authorizes the appointment of.

All existing officers having been placed under the control of the Commissioners by the clauses preceding the 26th, the act next proceeds to provide for the organisation of a new system of administration,—a system which can only be introduced by superseding the officers referred to in the preceding sections, and supposed to be confirmed and established by them; but which would be most naturally and easily introduced by the previous exercise of the powers of regulation and control provided for by the previous enactments.

The 26th section authorizes the commissioners “to declare “so many parishes as they may think fit to be united for “the administration of the law for the relief of the poor.” It converts all workhouses of the separate parishes to the common use of the union, and the sections immediately following provide for the common expenditure of unions in acquiring workhouses and other property necessary to the management of the poor, or incurred in any way for the common use or benefit of the united parishes.

The only limit expressly made to the universal operation of the 26th clause, is the discretion of the Commissioners, and a consequential restriction as to parishes already in union, *expressly* made by the 32d section, which will be now adverted to.

This 32d section enables the Commissioners “from time to “time, as they may see fit, by order under their hands and “seal, to declare any union, whether formed before or after the

“ passing of this act, (*except when united for the purposes of settlement or rating*), to be dissolved, or any parish or parishes, specifying the same, to be separated from or added to any such union, and, as the case may be, such union shall thereupon be dissolved, or such parish or parishes shall thereupon be separated from or added to such union accordingly ; and the said Commissioners shall in every such case frame and make such rules, orders, and regulations *as they may think fit for adapting the constitution, management, and board of guardians of every such union*, from or to which there shall be such separation or addition as aforesaid, to the altered state of the same, and every such union shall after any such alteration be constituted, managed, and governed as if the same had been originally formed in such altered state ; and in case any union shall be wholly or partially dissolved as aforesaid, then the parishes constituting, or, in case of a partial dissolution, separated from any such union, shall thenceforth be subject to be reunited, or united with other parishes or unions, or otherwise dealt with according to the provisions of this act as the said Commissioners shall think fit.”

It then proceeds to provide, that the rights, and interests, and obligations of the parishes affected by the alteration in respect of their common property and common liabilities shall be ascertained and secured, and that the rights of third parties shall not be affected, unless with their consent in writing, and “ that no such dissolution, alteration, or addition shall take place or be made, unless a majority of not less than two-thirds of the guardians of such union shall also concur therein.”

Note.—1. That this is a provision for, and the proviso as to concurrence of guardians a restriction on, the dissolution or alteration of *unions*, but not of the boards of *guardians of unions*, nor of the boards of guardians of single parishes.

2. That the details of the clause show the regard the legislature had in its enactment to the mutual and common rights and liabilities of the several united parishes, in respect of the property and obligations of the whole union, and its care that no disarrangement of such rights and liabilities shall take place.

3. That the exception as to unions for settlement and rating, indicates, in like manner, the object which the legislature intended to guard in this section,—all the parishes in

such unions being equally liable to relieve all the paupers of the parishes without distinction, and the effect of a dissolution or alteration in the number of parishes would therefore produce incalculable confusion as to the burdens to be borne by each, and to the settlements of paupers to be assigned to each.

4. That these provisions are wholly inapplicable to the concerns of a single parish, where no change is effected of mutual and common rights or obligations, whether in respect of settlements or of third parties, by the introduction or superseding of its functionaries, so long as it remains a single parish.

5. That the section indicates no regard whatever for the boards of *guardians* of the unions, except in as far as it may be necessary to alter their constitution, when the material object, a change of the union, takes place. When a complete dissolution of union takes place, the guardians are extinguished without even a casual notice; when it is only altered, the Commissioners are to modify the constitution of the guardians at their pleasure.

6. To confound the dissolution of an *union* with the superseding of the *guardians* of the union, would therefore be in the first place a mere confusion of terms, the meaning of which is totally distinct, and which the legislature has amply distinguished: and in the second place, would be to overlook the material objects of the enactment; and the extension of this confusion of terms to a single parish would operate to apply to a single parish the consideration of an enactment wholly applicable to its condition and circumstances.

7. The argument that consent being necessary to authorize the dissolution or alteration of an *union*, consent is therefore necessary to authorize the transfer of the functions of a board of *directors* in a single parish to a board of *guardians*, requires other foundation than that supplied by the 32d section.

8. That therefore the 32d section, though it would prevent *any single parish in an union* being placed under a board of guardians under the 39th section, can only affect the latter section where an *union* already exists, and has no relation to the fact, that a board of guardians or similar functionaries exists in a single parish.

The succeeding sections proceed to provide for the formation of unions of various kinds; the 37th authorizing the formation of unions under Gilbert's Act (22 Geo. 3, c. 83).

At length the 38th provides for the constitution and election of guardians for unions.

This requires no further observation than :—

1. That the legislature has amply distinguished the union itself, and the guardians of the union. The union being provided for by the 26th and following sections, and the board of guardians being provided for at a distance of twelve sections.

2. That in this, as in the 39th section, the legislature erects the board of guardians by its own act, leaving the occasion for the act to be judged of by the Commissioners, the words are, "*where any parishes shall be united by the order or with the concurrence of the Commissioners, a board of guardians for the relief of the poor shall be constituted and chosen,*" &c.

The 39th section, the unrestrained words of which are the subjects of the case, then follows : this has been already cited and its terms remarked on.

The 40th prescribes the mode of election, which is characterized in the judgment as "a favourite object throughout the act," but which it is nevertheless the effect of the present judgment to exclude from all parishes where there are any elected functionaries whatever for the relief of the poor.

The only remark that this section requires is, that except there be express indications to the contrary, no presumption can be raised that the legislature could intend to prefer and to establish other modes of election, than those which it was engaged in enacting ; but that if the legislature had such a preference or regard for other modes of voting, it would have enacted them in preference, or at least have expressed its intention that they should not be superseded.

The enactment apparently most relied on, as determining the construction of the 39th section, is the 41st. It requires a careful examination, and for convenience shall be divided into its three chief members. It enacts,

1. "That all elections of guardians, visitors, and other officers, for the execution of any of the powers or purposes of the said recited act made and passed in the twenty-second

“ year of the reign of his said late majesty king George the
 “ Third, intituled, *An Act for the better Relief and Employ-
 “ ment of the Poor*, or of any local act of parliament relating
 “ to poorhouses, workhouses, or the relief of the poor, or any
 “ act to alter or amend the same respectively, shall hereafter,
 “ so far as the said Commissioners shall direct, be made and
 “ conducted according to the provisions of this act.”

2. It then proceeds thus :—“ Provided always, that it shall
 “ be lawful for the said Commissioners, if they shall so think
 “ fit, from time to time, with the consent of the majority of the
 “ owners of property and rate-payers of any parish, or of any
 “ union now existing or to be formed under the provisions of
 “ this act, *to alter the period for which the guardians to be ap-
 “ pointed under the provisions of this act for such parish or
 “ union*, or any of them, *would under the provisions of this act*
 “ hold office, for such other periods or period as to the said
 “ Commissioners, with such consent as aforesaid, shall seem
 “ expedient—”

3. —“ And also to make such alterations in the number,
 “ mode of appointment, removal, and period of service of the
 “ guardians, or any of them, of any parish, or of any union
 “ now existing *or to be formed under the provisions of this*
 “ *act*, as to the said Commissioners, with such consent as
 “ aforesaid, shall seem expedient.”

Note I.—That the first part of the clause gives power to
 the Commissioners to introduce the mode of election provided
 by the act. This they may do without consent. This part
 of the clause can, of necessity, have no operation in a union
 formed, or in a parish governed by guardians under the pro-
 visions of the act itself, as this mode of election would already
 exist there. In this the first part most materially differs from
 the rest of the clause.

The cases where the first part of the clause may operate
 are :—

1st. In all parishes or unions where guardians, visitors, and
 similar officers exist, and where the Commissioners may con-
 sider it proper that they should be continued.

2dly. Where the commissioners may concur, under the
 37th section, in forming new unions or incorporations under
 Gilbert's act.

3dly. In unions in which the consent of guardians cannot be obtained to a dissolution of the union.

In all these cases it may be desirable to introduce the mode of election prescribed by the act, and this the Commissioners have an unqualified power to do.

II. The second member provides *not* for an adoption of the act, but for a departure from its provisions. It therefore applies solely to parishes and unions already under the act, and the consents here have nothing to do with the *introduction* of the provisions of the Poor Law Amendment Act; but only with the *dispensation* with its provisions; but the Commissioners are not permitted to depart from the model of the act at their unrestricted pleasure. It is necessary to prevent the Commissioners' from adopting capricious modifications of the standard prescribed by the act—while a beneficial alteration should not be prevented. This part of the proviso, therefore, allows of *departures from* the provisions of the act itself (having no reference to modifications of other acts) on condition that the rate-payers and owners consent that the provisions of the Poor Law Amendment Act be departed from.

III. But it is not only possible that it may be useful in some cases to depart from the provisions of the Poor Law Amendment Act as to the constitution of guardians, but also that where it may be generally advisable or necessary to retain the officers appointed under other acts, it may still be desirable to modify their constitution so as not to conform either to that of guardians under the Poor Law Amendment Act, or to that prescribed by any other statute. Yet it is not advisable that the Commissioners should cast aside all statutory models whatever, in this respect, at their mere pleasure; the consents of rate-payers and owners are therefore again required; but with this the Commissioners may make any alterations they see fit, in the particulars named, whether these alterations be from the provisions of the Poor Law Amendment Act itself, or from any other statutory model whatever.

The summary of this section is, that no impediment is presented by it to the adoption of the provisions of the Poor Law Amendment Act in the matters to which it alone relates,—that it even allows departures from its provisions with consent of the rate-payers, and by the last words allows of de-

partures, not only from its own provisions, but from those of all statutory provisions whatsoever with like consent.

Thus, instead of being restrictive, this section confers three sets of powers additional to those before possessed by the Commissioners under its provisions; two of these classes of powers, however, being qualified as otherwise too large to be safely conferred.

Any conclusion, therefore, that the section restrains the adoption of the provisions of the Poor Law Amendment Act, is without foundation as regards the terms of the section itself; and the assumption that the consents are provided for the purpose of such restraint, or for any other purpose than enlarging conditionally the power of the Commissioners, would be inconsistent with those terms, and would render the whole provision, what Mr. Justice Patteson, adopting that assumption, admits that it is, namely, "*not very intelligible*" (p. 391). Yet unintelligible as it thus becomes, it is used with this assumption to restrict the clear and unrestrained words of section 39. While with a careful analysis of its terms it becomes a most useful and intelligible supplement to that section and to the other sections relating to the constitution of guardians.

The remaining provisions are of a more miscellaneous character; but the control of existing authorities, and the organization of the new, having been provided for, the subsequent provisions have reference to both suppositions, either that the old or the new functionaries may have to administer them.

Thus, the 53d and 54th sections exclude the justices of the peace from the ordering of relief where any select vestry or guardians, or similar functionaries, exist, except in extreme cases; and the 54th enacts, that the ordering, giving, and directing of all relief in such places "*(but subject in all cases to, and saving and excepting the powers of the said Commissioners appointed under this act)* shall appertain and be long exclusively to such guardians of the poor or select vestry, according to the respective provisions of the acts under which such guardians or select vestry may have been or shall be appointed."

On this an argument is founded, that these words preserve the existence of the guardians and select vestries under local acts; but it is to be observed, 1st, that this provision comes

into effect from the passing of the act, and before any new organization could be effected: 2d, that the exclusion of authority is of that of the justices and overseers,—and that it is to extend the words beyond the apparent object of the act to consider the exclusion to operate against the commissioners' powers.

It is also attempted to limit the effect of the express exception of the commissioners' powers, by construing it to reserve the powers of the commissioners of regulation and control merely: on this it is to be observed, that this is to limit words, perfectly general, to cases of a specific kind, which might have been described as easily as the present terms could be devised.

Such are the provisions and the premises upon which the interpretation of the 39th section is founded. These have been necessarily observed upon at length, in order that the examination of the mode of interpretation adopted may be more easily and summarily proceeded with.

It is now competent to examine this process of interpretation, and the argument involved in it, which will now be illustrated in this order. In the first place, as regards the terms, premises, and elements of the argumentation by which the interpretation is to be supported.

1st. Of assumption of principles generally.

Illustrations:

Of assumption of the very principle in question;
(*petitio principii*.)

Of assumptions of particular premises.

2dly. Of generalisation and indication.

Illustrations:

Of the adoption of genus for species; and the reverse.

Of the adoption of species for genus (*pars per toto*).

Of generalisation from particular facts.

Of generalisation from accidental circumstances involved in particular facts.

Of the neglect or non-collection or suppression of particulars.

Of the incomplete enumeration of assumed particulars.

Of the incomplete enumeration of assumed alterations.

3dly. Of distinguishing terms.

Illustrations :

Of confusion of terms.

Of aggravation of the sense of terms.

Of supposed distinctions without a difference.

Of interpolations of distinctions.

Next as regards the process of argumentation itself, the premises being assumed or granted.

Illustrations :

Of inconsequential argumentation.

Of the assumption of consequence, and supplying the necessary premises.

Of unnecessary premises.

Of inconsistent premises.

Of inconsistent conclusions.

Of consequences attributed and denied to the same premises.

Of false dilemma.

Of inexhaustive alternatives.

Lastly, of technical rules of interpretation, or rules peculiarly applicable to the subject of legal interpretation ; being derived from the special nature of law, and from the mode and the conditions of its promulgation.

Illustrations :

Of neglect of the expressions of the legislature.

Of the adoption of untechnical criterion, or criterion excluded by the very nature of law.

Of neglect of untechnical criterion, or criterion necessarily attached to law by its very nature.

These points being illustrated as exemplifying the present practice of interpretation by the highest legal authorities, the exposition of the principles involved in the rules of legal interpretation will then be proceeded with in a more methodical order.

ART. VI.—CHURCH RATES.

Letter to the Right Hon. Lord Stanley, M.P. for North Lancashire, on the Law of Church Rates. By Sir John Campbell, M.P. for the City of Edinburgh. London, 1837.

"THERE are certain fundamental principles which nothing but necessity should expose to public examination ; they are pillars, the depth of whose foundation you cannot explore without endangering their stability."¹ Foremost amongst these fundamental principles stand the principle of property, and that to which the respect paid to long-established laws may be referred. Both of these it was the Attorney-General's duty to uphold and maintain ; and both of them he has endeavoured to shake to the best of his (as a writer) very moderate ability. In the style and fashion of his attack, however, he has not even the merit of originality, for it was Mr. O'Connell who first practised the mode here adopted of shaking and eventually subverting an institution ; his favourite system of tactics being to find out some verbal quibble or technical defect by which the law might be evaded or checked, and then employ the difficulty thus thrown in the way of its execution by himself, as an argument for repealing or subverting it. Just so the Attorney-General in the pamphlet before us exerts all his nisi prius acumen and special-pleading dexterity to prove to the discontented portion of the community, that there is no effective mode of enforcing a right which, by his own admission, has enjoyed a prescriptive authority for more than six hundred years ; that they may consequently resist it with impunity ; that, therefore, the right should be abolished, and, we presume, the establishment partially depending on it destroyed. We shall endeavour to neutralise the baneful influence of this attempt, and, if possible, prevent a repetition of it, by exposing its real weakness and dishonesty.

The learned knight (who, by the way, drops his official robe, probably to avoid soiling it, in his title-page) begins as follows :—

"As your lordship was pleased at the close of the late debate in the House of Commons, respecting church rates, very peremptorily to deny the law which I had laid down, in supporting the motion

¹ Curran's Speech for Archibald Hamilton Rowan.

of the Chancellor of the Exchequer, I feel called upon to justify my opinion by a calm reference to the authorities upon the subject. Let these be accurately and candidly examined, and I think your lordship will be convinced that the language you employed was hasty, and that you were prompted by partizans who had viewed the question superficially, or with a prejudiced eye. This mode of discussing it, I conceive, will be more satisfactory than a legal controversy in the House of Commons, which would not admit of a full citation of acts of parliament, or decisions, and could consist of little more than assertion and denial. The inquiry must necessarily be dull and tedious ; but I trust that no one who has ventured to dispute the opinion I gave, will refuse to enter into it fully and fairly.

"After what has happened I must anxiously take care that it be distinctly known what that opinion was. Be it remembered that I have never cast a doubt upon the legality of church rates, or disputed that if a church rate be regularly made by a majority of the parishioners, the payment of it may be lawfully enforced."—pp. 1, 2.

Amongst the partizans who backed Lord Stanley's opinion, though we are not aware that they prompted him, were Sir William Follett and Mr. Pemberton, who are not accustomed to view legal questions superficially. As to the Attorney-General's assertion that he has never cast a doubt upon the legality of Church Rates, it reminds us of the familiar dialogue between Lord Chesterfield and a lady of quality, who was anxious for the safety of her pug. "My little dog never bites, my Lord," said her Ladyship, just as the little dog was fastening on his heel ; "and I never strike little dogs, my Lady," said his Lordship, as he laid the pug sprawling with his cane. If we understand the bearing of the Attorney-General's argument upon Church Rates, its direct, palpable, unequivocal tendency is to inspire doubts of their legality ; for it will be exceedingly difficult to teach people to regard as legal a right the law refuses to enforce.

"Church Rates," continues the Attorney-General, "are certainly not of the remote antiquity that has been supposed by some, and there can be no doubt that, in this country, all the expenses attending divine worship were originally defrayed by the church itself, from a portion of the tithes."

He supports this proposition by the well-known passages from Blackstone¹ and Lyndwood, and proceeds—

"I might cite the epistle of Pope Gregory to Augustine the

¹ 1 Com. 384.

Monk, requiring a portion of the tithes to be set apart for the repair of churches,—an act of the Witenagemot in 1014, prescribing that a third part of the tithe shall be appropriated for this purpose,—and various decrees of councils in the twelfth and thirteenth centuries to the same effect. But *all the books of authority*, lay and ecclesiastical, agree in the position that the burthen was at first laid and long continued upon the tithes.

“Probably it was very gradually shifted to the parishioners, and their contributions to the expense were purely voluntary.

“The custom growing, it was treated as an obligation, and enforced by ecclesiastical censures.

“The courts of common law seem to have interposed for the protection of refractory parishioners, till the statute of *Circumspecte agatis*, 13 Edw. I., which is in the form of a letter from the king to his common law judges, desiring them to use themselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them, if they hold plea in court christiap of such things as are merely spiritual, as ‘*si prælatus puniat pro cimeterio non clauso, ecclesiâ discoopertâ, vel non decenter ornatâ.*’

“Lord Coke observes, ‘That some have said that this was no statute, but made by the prelates themselves, yet that it is an act of parliament,’ &c.

“In the printed rolls of parliament, 25 Edw. III. No. 62, it is called an ordinance; but in the statute, 2 & 3 Edw. VI. c. 13, s. 15, it is expressly stiled a statute, and it must now clearly be taken to be the act of the whole legislature. *

“From the year 1282, therefore, the bishops were authorized, by ecclesiastical censures, to compel the parishioners to repair, and to provide ornaments for the church.”—p. 3—5.

We should think this is going back far enough to satisfy any one, but we are tempted to pause a moment on the point, essentially an immaterial one, for the purpose of showing the Attorney-General’s real or assumed ignorance concerning it. He says all the books of authority, lay and ecclesiastical, agree in the position, “that the burthen was at first laid, and long continued upon the tithes.” Now we beg leave to ask him whether he considers Chief Justice Holt as an authority, for in *Ball v. Cross*, 1 Salk. 163, Chief Justice Holt held, “That by *common law* the parishioners of every parish are bound to repair the church, but by the *canon law* the parson is obliged to do it; *and so it is in foreign countries.*” In *Hawkins v. Rowse* (Holt’s Rep. 139), the same

learned judge says, "It is by the peculiar law of this kingdom that the parishioners are charged with the repairs of the body of the church;" and the same deduction must be drawn from the following passage in the second Institute:—

"This act of 28 Hen. VIII. extendeth not to general councells, but leave them as they were before, but all canons (as elsewhere hath been said) which are against the prerogative of the king, the common law or custome of the realme¹ are of no force.

"And in some cases this maketh for the clergy. By the canon law, parish churches are to be repaired by the parsons of the parish, but the custome of this realme being that the parish churches are to be repaired by the parishioners or inhabitants of the parishes, this canon bound not the clergy."—p. 653.

It is impossible to reconcile these authorities with the passage in Blackstone on which the Attorney-General relies, but the cause of the contradiction is clearly traced and explained by Mr. Swan, the author of an able pamphlet on the Principle of Church Rates:—

"Burn, in his Ecclesiastical Law, and Blackstone in his Commentaries, have been led into the mistake of considering the repairs of the body of the church to have formerly belonged to the bishops, and afterwards to the rectors, by taking the canons of Rome for the law of England. It is from Linwood that both derive their authority, and if reference be made to the note '*reparatione*,' in p. 53 of Linwood, the sentence will be found, which is the groundwork of the position thus taken up by them. *Reparatione*—'*Hæc reparatio de jure communi pertinet ad eum qui recipit partem illam, quæ ab antiquo assignata est fabricæ Ecclesiæ*—12 q. 2 quatuor. Et sic de jure communi pertinet ad rectorem, qui habet ipsam quartam, non autem ad parochianos—10 q. c. unio ubi hoc et non de pæ et re c. 1 in prim. vers. fabricæ per Arch. lib. 6.' These references are to the canons of Rome, which are on this very point declared by Linwood, in a subsequent passage, never to have bound the clergy in England. A passage similar to that above quoted from Linwood, will be found in p. 458 of Ayliffe's *Parergon Juris Canonici*, where the canons of Rome are referred to, and the explanation of these references is given by Ayliffe, in p. 5 of the same work. If due consideration be given to both these passages, it will be seen, that they have no application to the laws or clergy of this country; but on the contrary,

¹ Lord Coke and all the other high legal authorities use *common law* and *custom of the realm* as legal synonymes, which it may be as well for the reader to bear constantly in mind.

it will be found, in both authors, that, by the custom or common law of England, the parishioners are bound to repair the body of the church ; and the canon law, which has thus been placed in contrast with the common law of England, has unfortunately been taken by Burn and Blackstone to have been formerly the law of this country, and has afforded a handle for supporting the position, that the bishops and clergy ought by law to repair the churches, which has otherwise not only no foundation, but is opposed to all the highest legal authorities on the subject."—pp. 15, 16.

We need not dwell on the Attorney-General's reference to a MS. treatise "written by Edward Dudley, Privy Counsellor to Henry VII., to be found in the Harleian Collection, No. 2204," (has Empson left nothing fit for the member of a liberal government to quote ?) nor on his quotation from a Constitution of Archdeacon Winchelsea, in which he labours to discover traces of the original obligation : the inference is conclusively rebutted by 35 Edw. I. relating to trees growing in church-yards :—

"We will that the parsons of churches do not presume to fell these trees undiscreetly, but only when the chancel of the church doth want necessary reparations, nor shall convert them to any other use by any other means unless the body of the church likewise want reparations, and the parsons do of charity think good to give any of these trees to the parishioners wanting them ; which we do not command to be done, but where it is done we commend it."—*The Statutes of the Realm*, vol. i. p. 221.

It is here (in 1306) taken for granted that the parishioners were liable to repair the body of the church.

It did not suit Sir John Campbell's purpose to allude to various other provisions of the canon and statute law by which the common-law obligation is recognized and confirmed. It shall be our care to supply this deficiency. In one of the Canons of 1603 it is enjoined "that the churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired," &c. ; and these canons being framed in pursuance of 25 Hen. VIII. have the force of law. By 4 W. & M. c. 12, it is provided that, in cases of union, the parishioners of the adjunct parish shall be rated for the repairs of the principal church in the same manner in which they were rated for their own ; and in 7 & 8 W. III. c. 34, a summary process is provided for compelling Quakers to pay church rates.

By the common law, the canon law, and the statute law, therefore, it is clear that the obligation in question is incumbent on the parishioners.

The author proceeds :—

“ In Popish times there was probably little difficulty in raising the rate without any assistance from the secular courts. When the common law, by which the expense was to be paid out of the tithes, had been forgotten, there could be hardly any reluctance to contribute to a burthen from which all, being of the same religion, derived an equal benefit; and if any parish refused to make a church rate by a majority of the vestry, there was a certain remedy by placing the parish under an interdict, by which the parish church was shut up, the administration of the sacraments within the parish was forbidden, and if any parishioner died, he was to be buried without bell, book, or candle.

“ It is laid down by Lyndwood that this was the mode of proceeding, ‘ that so the parishioners may be punished by the suspension or interdict of the place.’

“ The question will be, whether since the glorious Reformation, an interdict having happily become impossible, a new remedy can be supplied, and the law can be altered without the sanction of Parliament.”—pp. 6, 7.

The question will be nothing of the sort, as we all know that the law cannot be *altered* without the sanction of parliament; and a little farther on the Attorney-General gives a widely different statement of the question. The intervening space is filled up with some irrelevant observations, to the effect that church rates are not a charge upon the land. Strictly and technically, they are not—virtually and practically, they are; for they are assessed upon the occupier in respect of his occupation, precisely in the same manner as poor-rates and various other charges, which the landed interest have been generally in the habit of regarding as a charge upon their estates. At last we get a statement of the real question :—

“ This short sketch of the history and nature of Church Rates will assist us in solving the main question, whether there be now any compulsory means of raising money to repair the church, if the parishioners refuse to make a rate for that purpose. If indeed the rate had been a charge upon the land, to which it has been subject from the earliest times, as affirmed by some to whom great reverence is due, there would be a strong probability that the

common law would afford a process for enforcing the obligation ; but if the contribution was voluntary in its origin, and has always remained personal, and for many centuries no remedy was known except spiritual censures, an inference may be drawn that spiritual censures can alone be resorted to, unless where a statute can be produced giving a remedy by civil process.

“ Now, what I maintained and do maintain is, that a legal Church Rate can only be made by a majority of the parishioners in vestry assembled ; and that if they meet and refuse to make a rate, there are no means by which the rate can be raised.

“ This is a very unsatisfactory state of the law, and is one among many reasons why, for the peace of the church and the benefit of religion, the law upon the subject should be altered, and that the expense of repairing the fabric of the church, and providing for the decent celebration of divine worship, should be defrayed from another source.”—pp. 9, 10.

This is certainly a very unsatisfactory state of the law, if the above statement be correct, but it by no means follows that the expenses in question should be defrayed from another source. On the contrary, if the legal obligation be, as the Attorney-General admits, undoubted, the proper course is to give, by legislative enactment, the means of enforcing it, an alteration which never seems to have entered the imaginations of the Attorney-General and his friends. But we are not yet satisfied that these means are wanting :—

“ It seems to be admitted on all hands, that in the first instance it is necessary to assemble the parishioners in vestry, and to propose to them to make a church rate,—when it must be put to the vote whether a church rate to a given amount shall be made or not. Let us suppose that they refuse to make any church rate. As the law now stands, what is to be done ? I say nothing can be done. Your Lordship says, it shall not depend upon the caprice of a majority of the vestry to grant or to refuse.

“ I will examine in detail the different compulsory expedients which have been suggested.

“ That which I think has been most strongly relied upon is a mandamus by the Court of King's Bench to the churchwardens and parishioners to make a rate. And if there were a legal obligation upon them, I conceive that upon their refusal a mandamus would be granted as a matter of course. If there be a refusal to make a poor-rate, or a highway rate, a mandamus immediately issues, which would be followed by an attachment, or process of imprisonment, against those who should disobey it.

"The experiment of a mandamus to compel the making of a church rate has been tried more than once, and has as often failed."—pp. 10, 11.

The Attorney-General conceives, that if there were a legal obligation, a mandamus would be granted as a matter of course. But if there were not a legal obligation, would not that be stated at once as the ground on which the mandamus was refused. No such ground ever was stated, and it is singular that in his statement of the cases, the Attorney-General invariably keeps the true ground of refusal out of sight. In the first case cited by him,¹ the judgment of the Court (which he suppresses) was given in two lines:—

"We cannot interfere by granting a mandamus, *this being a subject purely of ecclesiastical jurisdiction.*"

In his second case,² the judgment was: *Per Curiam* "You cannot call upon the churchwardens to *make* a rate; you can only call upon them to hold a vestry meeting for that purpose." His third and fourth cases³ prove nothing, having been decided with exclusive reference to the provisions of an act of parliament. His fifth is thus stated:—

"In *Rex v. Wix*, a mandamus was granted to elect churchwardens, that they might exercise the powers which lawfully belong to churchwardens, but no hint is thrown out that they could make a church-rate without the vestry."—p. 13.

This mode of drawing an inference is positively ridiculous, not a word having dropped from the Court as to the general powers of churchwardens, with the exception of a question put by Lord Tentenden "Who is to see to the repairs of the church, if there are no churchwardens?" to which the counsel replied as follows, receiving no contradiction from the Court.

"The churchwardens themselves have no power *in the first instance* to make any rate for the repair of the church, their duty being to summon the parishioners for that purpose, who may in fact make such rate independently of any control from the churchwardens. *Watson's Clergyman's Law*, c. 39; *Gibson's Codex*, p. 196. But there is no need for this mandamus to provide for the repairs of the church, for the Spiritual Court may compel the parishioners at large to repair,

¹ *Rex v. Churchwardens of Thetford*, 5 T. R. 364.

² *Rex v. Wilson*, 5 D. & R. 602.

³ *Rex v. Churchwardens of Lambeth*, 3 B. & Ad. 651; and *Rex v. Churchwardens of Brighton*, Mich. T. 1836.

and may excommunicate every one of them till it is repaired.

Watson, c. 39."

In his sixth and last case, the judgment was:—

"Although this Court will not interfere by mandamus to compel the churchwardens, &c., to *make* a church rate, which is properly of ecclesiastical cognizance, the right and powers of which are saved by the act (10 Ann.), yet they will put in motion their functions *in ordine ad*, i. e. to assemble in order to inquire and agree whether it be fit that a rate should be made."

On this case Sir John Campbell remarks:—

"The last case is particularly strong to show that as far as the common law is concerned, the making of a rate is an act in the discretion of the vestry, as the parishioners were ordered to meet and to consider of it; just as a mandamus will be granted to quarter-sessions to hear an appeal: but wherever the decision is in the discretion of the parties to whom the mandamus is directed,—when they have deliberated, the power of the superior Court is at an end, and the refusal to interfere farther proves the act to be discretionary.

"I hope that after these authorities your Lordship will no longer insist upon the remedy by mandamus, from whatever quarter it may be recommended."—pp. 13, 14.

The refusal to interfere farther is a gratuitous assumption; the above cases simply go to the extent of showing that a mandamus to make a rate in the first instance will be refused, and the ground alleged, namely, that the making of a rate is properly of ecclesiastical cognizance, is one which it would be as easy to reconcile with the final and effective as with the partial and preliminary interference of the Court. At all events, this ground completely negatives the inference that the actual making is discretionary—as does the granting of a mandamus at all, the inference that there is no legal obligation to repair. Let us look, however, to the form of the mandamus it has been customary to grant.

"In M. 10 Geo. II. a mandamus was granted to the churchwardens and overseers of the poor of the parish of St. James, Clerkenwell, and to the principal inhabitants thereof, *to assemble together in the parish church to make rates and collect the money for repairing the church*; and in E. 1 Geo. III. a mandamus was granted to the vicar, churchwardens, and parishioners of Croydon, to hold a vestry and nominate ten persons out of whom trustees were to choose collectors of a rate for the repair of the church."¹

¹ 2 B. & Ad. 199.

Now does Sir John Campbell mean to say that such a mandate would be satisfied by a bare deliberating? or will he even assert, that in the case which he brings forward as analogous, a mandamus to hear an appeal, a bare deliberating would be enough. If he does, we beg leave to refer him to Lord Tenterden, who expressly declares, that the Court of Quarter-Sessions may be compelled by mandamus to hear *and decide* an appeal.¹ But the records of the Court supply one precedent at least directly in point:—

“Easter Term, 37 Geo. III. Mandamus to the select vestry of the parish of Preston *to make a rate* to repair the parish church, and therein to assess in the proportion of equal thirds the three several divisions of the parish.”

We are not acquainted with the peculiar circumstances of this case, and (not to imitate Sir John Campbell's style of rash assumption), it may be as well to caution the reader that before drawing positive conclusions from the granting or refusing of a mandamus, the exact state of facts should be ascertained,—as whether there was a custom or question as to boundaries, which the spiritual jurisdiction would be incompetent to try, or whether the spiritual court had or had not been resorted to in vain,—for as the sole ground of refusal is, that the making of a rate is matter of ecclesiastical jurisdiction, we do not well see how a mandamus could be refused if it were made to appear that the ecclesiastical court either could not or would not interfere with effect. If the spiritual court can enforce the obligation, well and good; if it cannot, the Court of King's Bench is *ipso facto* bound to interpose.²

The Attorney-General next asks triumphantly,—

“Can anything more be done in the Courts of Common Law? Will an indictment lie against the inhabitants of a parish for not repairing a church, as against the inhabitants of a parish for not repairing a highway, or against the inhabitants of a county for not repairing a public bridge? If the repair of the church were a common law liability, like the repair of a highway or a bridge, I have no difficulty in saying that it might be enforced by indictment: but there is no precedent for such a proceeding, and I believe no lawyer will say that it could be adopted.”

¹ 4 B. & C. 849.

² If a statute gives a right, the common law will give a remedy to maintain that right; à fortiori, where the common law gives a right, it gives a remedy to maintain it.”—Per Holt, C. J. 1 Salk. 21.

(The reason of the non-existence of such a precedent, is that the subject has always been regarded as of ecclesiastical jurisdiction.)

"As there is no remedy at law, can equity give relief? None. No ingenuity could make this out to be a case of trust, or could find the proper parties to the bill.

"The only recourse then is to the Ecclesiastical Courts. A valid rate they can enforce; but without a valid rate they are now powerless. The churchwardens may be cited; and if they had funds in hand, they might unquestionably be compelled to repair the church. It seems to me equally clear, that on showing that they have no funds in hand, and that a rate has been refused by the vestry, they must immediately be absolved. I shall prove, by and bye, that they are not bound to lay out money, or to incur personal responsibility without a rate having been previously laid on to reimburse them, and that to repay a debt already incurred, a rate cannot lawfully be laid on, even by a majority of the vestry. Therefore, if the Ecclesiastical Court were to take any proceedings against churchwardens who have no funds, and who, having done their best, can obtain none, a prohibition to stay the proceedings would be immediately granted. *A fortiori*, nothing can be done against an individual parishioner, who is not an officer, by monition or otherwise. *It has not been suggested that the majority who refused the rate may be excommunicated for that act.* The interdict is gone, and it is replaced by no substitute.

"There being no remedy in any Court, civil or criminal, lay or ecclesiastical, without a valid rate, the only question remaining is, whether a valid rate can be made without the consent of a majority of the vestry."

Not quite the only question; there is first a case or two to be discussed. In *Blank v. Newcomb*,¹ Holt, C. J. said:—

"The right course is for the Spiritual Court to give sufficient notice to the parish, to meet and make a rate for the reparation of the church, and for neglect, &c. *they may be excommunicated*; but Ecclesiastical Courts cannot make a rate, or appoint commissioners to do it."

In *Rogers v. Davenant*,² again:—

"It was agreed by the Court, that the Spiritual Court has power to compel the parish to repair the church, by their ecclesiastical censures, but they cannot appoint what sums are to be paid for

¹ Holt, 594.

² 2 Mod. 8.

that purpose ; because the churchwardens, by the consent of the parish, are to settle that. As if a bridge be out of repair, the justices of the peace cannot set rates upon the persons that are to repair it, but they must consent to it themselves. Those parishioners here, who are willing to contribute to the charge of repairing the church, may be spared, *but as for those who are obstinate and refuse to do it, the Spiritual Court may proceed to excommunication against them.*"

In another report (1 Mod. 194) of the same case, it is said :

" North, Chief Justice.—The Spiritual Court may compel parishioners to repair their parish church if it be out of repair, *and may excommunicate every one of them till it be repaired* ; and those that are willing to contribute must be absolved, till the greater part of them agree to assess a tax, but the court cannot assess them towards it. It is like, to a bridge or highway ; a *distringas* shall issue against the inhabitants to make them repair it, but neither the King's Court nor the justices of the peace can impose a tax for it."

And again, 1 Mod. 237 :— .

" By the Court.—First, If a church is in decay, the bishop's court must proceed against the whole parish to have it repaired ; for they cannot rate any particular person towards the repair of it."

After this, will Sir John Campbell venture to repeat that " it has not been *suggested* that the majority who refused the rate may be excommunicated for that act." But " the interdict is gone, and it is replaced by no substitute." What then has become of the statute 53 Geo. III. c. 127, enacting that in the case of persons neglecting or refusing to pay obedience to the lawful orders and decrees of the Ecclesiastical Courts, a writ *de contumace capiendo* shall issue for the purpose of compelling them ? Really the manner in which Sir John Campbell deals about assertions is perfectly unprecedented in controversy, and our wonder is not lessened at finding him in the next paragraph referring to the cases last quoted, for the purpose of establishing (what no one disputes), that no legal rate can be made by the Ecclesiastical Court or episcopal commissioners, without an allusion to those parts of the decisions (above extracted) which bear against himself.—

" The last expedient is to contend, that if the parishioners refuse a rate, the churchwardens may, of their own authority, make a valid rate in spite of them.

"I must first observe that this would be a very strange law, as it entirely annihilates the power and control which the parishioners have immemorially exercised over the rate. If the churchwardens have the power, they must be allowed to judge of the quantum of the rate, as well as the necessity for it, and the assembling of a vestry to consider of a rate would, in every instance, be a mere mockery. The privilege of the parish in this respect would be such as would belong to the House of Commons, if, upon their refusal to grant a supply, or such a supply as the minister requires, a tax to raise the amount might be imposed by the king's proclamation."—pp. 16, 17.

It would not be at all strange; the churchwardens being for this purpose the representatives of the parish. It would be much stranger if the parishioners could evade the liability by simply refusing to meet. Is there any thing strange in the power vested in the parish officers of making a poor-rate?

"I may further observe" (he continues) "that if there were such a law, it would be well known,—it would be laid down in all the books upon the subject—and having the merit of being very simple and efficacious, it would be constantly acted upon where a rate is refused by the vestry.

"But it is not to be found in any book that treats professedly of church rates, or the practice of the ecclesiastical courts.

"In Degges Parsons Councillor, part 1, c. 12, the author, with some hesitation, says, he conceives that if the parishioners refuse or neglect to join in making an assessment, the churchwardens having just cause for such assessment may proceed alone, they being liable to ecclesiastical censures for not repairing the church. He immediately adds, however, 'But some are of opinion that the churchwardens cannot proceed alone, but must compel the parishioners to do it by ecclesiastical censures: *Ideo quære.*'

"His only reason, the supposed liability of the churchwardens to punishment, for not repairing without funds, is *now proved to be fallacious*, and if he had been aware of this he would probably have agreed with those who, he observes, deny the power of the churchwardens to proceed alone, and he would not have considered the matter doubtful."

Where is it proved to be fallacious? the Attorney-General cites no authority, and Burn, after mentioning the old practice of laying on an interdict, says, "But this was before the time

that churchwardens had the special charge of the repairs of the church, *and it seemeth now that the process shall issue against the churchwardens, and that they may be excommunicated for disobedience.*¹” But the Attorney-General says, “it is not to be found in any book that treats professedly of church rates or the practice of the ecclesiastical courts.” Admitting that his own quotation from Degge does not refute this assertion, he must surely allow that Watson’s is a book of this description, and Watson says:²—“the parishioners ought to be summoned by the churchwardens to meet and agree to lay a tax to do it, and if they refuse or neglect to meet, *or to make a rate*, the churchwardens may then make a rate alone if needful.” At page 397 this statement is repeated with the reason,—because the churchwardens, and not the parishioners, are to be cited and punished for a defect in repair.

So much for the Attorney-General’s accuracy regarding one class of authorities. Let us now examine his statement regarding those which are more peculiarly within his own department:—

“In Viner’s Abridgment, and in Bacon’s Abridgment, title ‘Churchwardens,’ it is said that if the parishioners upon notice refuse to come, or being assembled, refuse to make any rate, the churchwardens may make one without their concurrence, on the ground that being liable to be punished in the ecclesiastical court for not repairing the church, it would be unreasonable that they should suffer by the wilfulness and obstinacy of others.

“These two compilations, I conceive, are of no authority, unless when they are supported by the decisions which they cite. The following *is the only case referred to* in support of this doctrine:—

“‘T. T. 35 Car. 2—In Banco Regis, Anonymous.—A motion for a prohibition to a suit in the Ecclesiastical Court, for a churchwarden’s rate, suggesting that they had pleaded that it was not made with the consent of the parishioners, and that the plea was refused.

“‘The Court said that the churchwardens (if the parish were summoned and refused to meet and make a rate) might make one alone for the repairs of the church, if needful; because that, if the repairs were neglected, the churchwardens were to be cited, and

¹ Burn. Ecc. L. 355.

² Watson’s Clergyman’s Law, 395.

not the parishioners ; and a day was given to show cause why there should not be a prohibition.'

" Now, in this very loose report of this *anonymous* case, by an inaccurate reporter, there is only an *obiter dictum* as to the power of the churchwardens, which is contradicted by a rule to show cause being granted why there should not be a prohibition, or in other words, why the rate should not be quashed as invalid ; and the reporter never states what was the judgment of the Court when cause was shown."—pp. 18, 19.

The abridgments in question show, at all events, what was the general understanding of the law, and this remark is more peculiarly applicable to Bacon's, which has been several times re-edited under careful editors, by whom the very passage in question has been annotated. But the Attorney-General says, that the case he quotes is the only one referred to in support of the doctrine, and that an anonymous one. Now here we distinctly charge Sir John Campbell with wilful mistatement, or culpable inaccuracy. He may take his choice between the two. In the first place, the case is not anonymous. In *Ventris*, 367, it is reported, *Thursfield v. Jones*, with the names in the ordinary place. In the second place, it is not the only case referred to in *Viner* and *Bacon*. The marginal reference in *Bacon* is, *Vent.* 367 ; *Mod.* 79, 194 ; and in *Mod.* 79 we find :

" Michaelmas Term, 23 Car. 2. Anonymous.

" Moved for a prohibition to the Spiritual Court. For that they sue a parish for not paying a rate made by the churchwardens *only* ; whereas by the law the major part of the parish must join. *Twisden*, Justice. Perhaps no more of the parish will come together. *Counsel*. If that did appear, it might be something."

In *Viner's* Abridgment, the marginal note, after citing *Ventris*, continues :—" *S. P. by Holt, Ch. J. Obiter, Comb.* 344, *Mich.* 7 *W. 3. B. R.*" The case referred to is :—

" A prohibition was granted to stay a suit in the Ecclesiastical Court. The libel setting forth, that a rate was made for repair of a church and chancel in Exeter ; for the parish is not to be rated to the repair of the chancel, and the rate being entire the prohibition must be so too, for it is a void rate *in toto*. *Holt* was of opinion that if there be public notice given to the parishioners, and they will not come, the churchwardens may make a rate without them."¹

¹ *Comberbach*, 344.

The Attorney-General was of course at liberty to dispute the authority or application of these cases, but he was no more justified in suppressing the references, than in describing the case cited by him as anonymous. We say moreover that in that case there is more than an *obiter dictum*; there is an opinion of the Court as to the precise matter of dispute; and every lawyer knows that the granting a rule, under such circumstances, is simply tantamount to saying; "our opinion is against you, but you may have the matter formally argued if you like." The non-revival of the question proves that the applicants believed their case to be untenable.

He next attacks the decision of Sir W. Wynne:—

"I have, I believe, stated all that is in print, or that was at all known in Westminster Hall on this point, till, during the reply of the Chancellor of the Exchequer, a decision of Sir Wm. Wynne in the year 1799, was cited from a MS. note of Dr. Arnold, by Dr. Nicholl, M.P. for Cardiff. The case is *Gandern v. Selby*, and was very accurately cited: but when examined will be found entitled to no weight whatever; and I apprehend it must have remained unpublished, like many other notes of erroneous decisions, because the publication of it would only introduce uncertainty and confusion into the law.

"Selby, a churchwarden of Easton Mawdit, sued *Gandern* in the Ecclesiastical Court of Peterborough, for non-payment of church rate, and he alleged in his libel that the church being out of repair, and other things wanting, &c.; the parishioners met and agreed on a church rate of 9½d. in the pound. The defendant pleaded among other things that the rate had not been obtained by the major part of the parishioners. It appeared by the evidence, that the parish church requiring some repairs, Selby, having no funds in hand, instead of calling a vestry, and making an estimate of the repairs, ordered such repairs as he thought necessary to be done on his own credit. He then called a vestry to make a rate to reimburse him, and asked a rate of 9½d. in the pound. The parishioners objected, that the repairs were not necessary, and that they had employed a mason to overlook them, who confirmed this statement. They offered a rate of 6d. in the pound, and refused more. Selby, then, by his own authority, made a rate of 9½d. in the pound for his own reimbursement.

"Sir W. Wynne, on appeal to the Court of Arches, is supposed to have held this rate to be valid, and to have condemned the appellant in costs.

"Sir W. Wynne cites no authority whatever, and gives no reason,

except that churchwardens may be proceeded against for not repairing, although they cannot get a rate, which is clearly a mistake, and that, as an interdict and other ecclesiastical censures are now unavailing, there is no other remedy.

“ Without any disrespect to the memory of Sir W. Wynne, I must be permitted to say, that if he so decided, he decided erroneously.

“ It seems strange, in the first place, that the plaintiff should have succeeded, when the material allegation of the libel had been denied and negatived by the evidence—that the 9½d. rate was made by a majority of the parishioners. Even if a rate made by churchwardens against the will of the parish be good, the truth ought to be stated in a proceeding to enforce it: but it might have been inconvenient to have stated the truth in the libel, as the want of jurisdiction would have appeared, and the proceeding would have been held null in a Court of Law after sentence. Next, we have the anomaly of one churchwarden acting without any account of the other; and such an act by one of two churchwardens must be void. Then we have it laid down, that a churchwarden can make a rate for his own reimbursement, and that he is the sole judge of the sum required.

“ I will venture to say, that if Gandern had applied to the Court of King’s Bench, or that, if the case had been brought by appeal before the Court of Delegates, the rate would have been held to be invalid. The objection that it was retrospective would alone have been fatal. It is now considered clear law, that a retrospective church rate is bad; and this goes to the very foundation of the supposed power of the churchwardens to make a rate against the will of the parish.”—p. 19—21.

In a subsequent passage the Attorney-General admits “ that if none but the churchwardens attend, the churchwardens, *then constituting the parish*, may make a rate.” It is obvious that Selby considered himself as representing the parish, and pleaded according to the legal effect. The alleged anomaly of one churchwarden acting without the other is of little force, as there might have been but one; and though it must be admitted that a retrospective church rate would now be considered bad, we are at a loss to see how this goes to the very foundation of the supposed power of the churchwardens. In proving the invalidity of a retrospective rate, Sir John Campbell incautiously refers to a case decided by Sir John Leach, M. R., who says: “ And although the *Spiritual Court*

may compel a church rate for the purpose of repair, it must follow the law, and cannot compel a rate for reimbursement."

"Finally, (he continues,) Sir W. Wynne's doctrine is *completely demolished* by a decision of the Court of Exchequer, in the time of *that great judge*, Lord Lyndhurst. The case was *Northwaite v. Bennett*, in which Mr. Baron Bayley intimated a strong opinion, that a churchwarden is not bound to do repairs to a church on credit; that it is his duty to take care that he has funds in hand, and to pay ready money; and that it would be a good answer for a churchwarden to a libel in the Spiritual Court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success.

"Lord Lyndhurst.—'No fund appeared to exist at the time out of which the repairs might be paid for. I question if a churchwarden is bound to incur responsibility by putting a church in repair, if the parish do not previously supply him with funds for that purpose.'"—pp. 26, 27.

Would not any one suppose, from the manner in which "that great judge" is mentioned, that the *complete demolition* came from him. Yet he simply questions if churchwardens are bound to incur responsibility prior to the making of a rate. He nowhere negatives their power or duty to make one if the parishioners refuse. Mr. Baron Bayley's "strong opinion" is contained in the following sentence:—

"*It is probable* that it would be a good answer for a churchwarden to a libel in the Spiritual Court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success."

The Attorney-General leaves out the words in italics. Indeed, he seems throughout incapable of stating results or drawing deductions with accuracy.

"Lord Holt (he proceeds) is said to have been of opinion, 'that if there be public notice given to the parishioners, and they will not come, the churchwardens may make a rate without them.'

"I have no doubt that this opinion is sound, and that it is the only foundation for the notion, that the churchwardens can make a rate without the parishioners.

"A more extensive power in the churchwardens was unknown to Lyndwood; and Gibson, elaborately defining the power of the churchwardens in making a rate, must be taken to deny it:—

" 'Rates for the reparation of the church are to be made by the

churchwardens, together with the parishioners assembled upon public notice given in the church. And the major part of them that appear shall bind the parish; or, *if none appear, the churchwardens alone may make the rate, because they, and not the parishioners, are to be cited and punished in default of repairs.* But the bishop cannot direct a commission to rate the parishioners, and appoint what each one shall pay. This must be done by the churchwardens and parishioners, and the Spiritual Court may inflict spiritual censures till they do.'—pp. 28, 29.

Now, if the churchwardens are to be punished in default of repairs, the obvious inference is that they may make a rate if the parishioners refuse. To adopt the Attorney-General's mode of arguing—it would be strange, if coming and refusing placed the churchwardens in a different position than refusing to come. We resume—

“ Upon a refusal, spiritual censures were considered the only remedy.

“ I will now cite some common law authorities, in which the power to make the rate was held to be in the majority of the parishioners, without any restriction, qualification, or exception.

“ ‘Pierce v. Prowse, Salk. 165.—Churchwardens assessed a rate, for repairs of the church, and after libelled against a parishioner for not paying it. *Et per cur.* being moved for a prohibition.—The parishioners ought to assess the rate, and not the churchwardens.’

“ ‘S. C. 1 Lord Raymond, 59.—Mr. Pratt moved for a prohibition to the Consistory Court of the bishop of Exeter, where his client was libelled against for a rate assessed by the churchwardens by custom, for the repair of the church, as well the chancel as the nave of the church; and resolved, 1. That the parishioners, and not the churchwardens, ought to assess the rate.—A prohibition was granted.’

“ In Rogers v. Davenant, as reported 2 Mod. 194.—‘Wyndham, Atkyns, and Ellis, Justices, accorded, the churchwardens cannot, none but a parliament can, impose a tax, but the greater part of the parish can make a bye-law, and to this purpose they are a corporation.’

“ In a case reported, 1 Mod. 79, it is stated to have been decided that, ‘*the Spiritual Court cannot impose the payment of a rate made by churchwardens only.*’ (This is a marginal note.)

“ ‘Moved for a prohibition to the Spiritual Court. For that they sue a parish, for not paying a rate made by the churchwardens only, whereas by the law the major part of the parish must join. TWISDEN, Justice.—Perhaps no more of the parish will come to—

gether. COUNSEL.—If that did appear it might be something.”—pp. 29, 30.

These cases simply prove that the *prima facie* right and duty are in the parishioners. Taken literally, they would negative the proposition of Lord Holt which the Attorney-General has just admitted, that the churchwardens may make a rate when the parishioners will not come. The last tells against the argument, and contradicts the marginal note, on which it is not certainly the ordinary practice to rely. The argument concludes by referring to the *ordinary* form of making a church rate, beginning, “We the churchwardens and other parishioners” &c.; and to the opinion of “an eminent divine, a thorough conservative, a determined opponent of the ministerial plan, the Hon. and Rev. A. P. Perceval, B. C. L.,” by whose opinions, eminent, conservative, honourable and reverend though he be, we most respectfully decline abiding.¹

As it is not our wish to meddle with the personal dispute between Lord Stanley and the Attorney-General, we have only one more paragraph to quote.

“I hope your lordship may think that I have now vindicated the legal opinion which I gave in the House of Commons upon the subject of making a church rate, and that although I did not then cite legal authorities, I did not speak without book. If the legal argument which I have the honour to address to you admits of an answer, let it be answered, and impartial inquirers will decide

¹ Equally do we decline abiding by a pamphlet which has just reached us, purporting to be *An Article upon Church Rates*, reprinted from the *Church of England Quarterly Review*. We subjoin a specimen:—

“Would scruples of conscience arise, and be pleaded, for not paying the impost for the repair of St. Sophia, or St. Peter’s? To be sure, *insane people are to be found all over the world*; but would Pope or Sultan listen to such nonsense? It really irks us to have to reply to it. What disease of idiosyncrasy is here, which mankind never before heard of! How can a conscience, be it ever so ignorant and nice, take detriment by submitting to a tribute, which the church cannot forbear to demand, and to insist upon receiving, through some channel or other, without unspeakable prejudice; to render herself liable to which, were to risk the salvation of souls committed to her cure.”—pp. 22, 23.

Again:—

“Would the voluntary principle, more especially in thinly populated districts, effectuate such good?—The voluntary principle!—*It ended in the deluge!*”—p. 28.

We humbly suggest to the friends of the writer, whether they should not immediately adopt the remedies suggested in a somewhat similar case by the Rev. Sydney Smith, namely, a moderate letting of blood, shaving and blistering the head, and keeping the *prima via* well and constantly open.

between us. But I must insist upon the practical remedy being pointed out for levying the rate upon the refusal of a rate by the vestry. Mere dicta as to the obligation upon the parish to repair will not invalidate my position."

We have given more than mere dicta as to the obligation, which the common law, the canon law, and the statute law concur in proving beyond the shadow of a doubt. The utmost that Sir John Campbell can be considered to have established is a doubt as to the precise mode of enforcing it, but the doubt is in which Court proceedings are to be taken; there being no doubt, in the opinion of the best lawyers, that if there be no effective remedy in the Spiritual Courts, the Court of King's Bench is not merely competent, but bound, to interfere.

What, then, setting party considerations aside, was the duty of the chief law officer of the Crown? Surely to support and maintain the law, instead of unsettling its authority, and be amongst the first to remedy its defects by legislative enactment (if necessary), instead of writing bad pamphlets to aggravate the mischief of uncertainty. Judging from the probable results, one might almost fancy that the Attorney-General had acted less with a view to the success of the Church Rate Bill (of which the Government are already heartily ashamed) than with a view to the filling of his own pockets by fees for resisting the enforcement of a duty, which has hitherto afforded hardly any scope for litigation, because it has been habitually and prescriptively observed. The *prestige* is now fairly broken, and there will be parish squabbling and local agitation enough to satisfy even our agitation-loving ministry, who can only keep their places by exciting and fostering a general feeling of discontent.

In conclusion, we have one remark to offer upon the style and tone of this production, which are on a par with its spirit and tendency. *Nisi prius* advocates, of the Attorney-General's cast of mind, are in the habit of dealing about assertions at random, and taking their chance for the proof. This may do very well with an ignorant or careless jury, but it will not do to adopt the same habit in writing, where the exaggeration may be fixed, followed and exposed; and we recommend Sir John Campbell to be more cautious in his next effort of this kind.

H.

DIGEST OF CASES

COMMON LAW.

[Comprising 4 Adolphus & Ellis, Part 2; 6 Nevile & Manning, Part 3; 1 Nevile & Perry, Part 2; 2 Meeson & Welsby, Part 2; Moody's Crown Cases Reserved, Part 4; 1 Moody and Robinson, Part 4; 5 Dowling's Practice Cases, Parts 2 & 3; and a selection from 7 Carrington and Payne, Part 3:—all Cases included in former Digests being omitted.—5 Tyrwhitt, Part 4, just published, contains no Case not before digested.]

AFFIDAVIT.

1. (*Statement of deponent's residence.*) In an affidavit by an attorney's clerk, it is unnecessary for him to state his own residence, if he states that of his master.—*Strike v. Blanchard*, 5 D. P. C. 216.
2. (*Title, amendment of.*) An affidavit on which a rule has been obtained, but improperly entitled, may be taken off the file and amended, on payment of costs, the opposite party having leave to file affidavits in reply.—*Rex v. Justices of Warwickshire*, 5 D. P. C. 382.
3. (*Sworn before Attorney's Clerk.*) An affidavit sworn before the clerk to an attorney who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of the rule of H. 2 W. 4, s. 6.—*Doe d. Grant v. Roe*, 5 D. P. C. 409.

AFFIDAVIT TO HOLD TO BAIL.

1. (*By Indorsee of Note.*) In an affidavit of debt by the indorsee of a promissory note against the maker, it is not necessary that the deponent should describe himself as the indorsee, if he traces title to himself; nor is it necessary to allege the maker's default.—*James v. Trevanion*, 5 D. P. C. 275.
2. (*On bill of exchange—Time to object to, by prisoner defendant.*) A prisoner comes too late, after 19 days, to object to a defect in the affidavit to hold to bail.

Semble, that an affidavit to hold to bail is not sufficient, which states that the defendant is indebted in "principal monies" due on a bill of ex-

change, unless it also states the amount for which the bill is drawn.—*Fowell v. Petre*, 1 N. & P. 227; 5 D. P. C. 276.

AGREEMENT.

(*Construction of.*) Assumpsit for work done under the following agreement: —“Mrs. E. agrees with Mr. B. to cleanse the cesspools to the 13 houses in S. street for 8*l.* 2*s.*; Mr. H.’s rent balance to be deducted from the said sum.” H. was a weekly tenant to the defendant of one of the houses. The agreement was signed in the middle of one of the weeks of his tenancy. At that time 2*l.* was due from him for rent; but when the work was completed, another week’s rent had become due. The judge, at the trial, having expressed an opinion that the *rent-balance* meant the amount due when the agreement was signed, and the verdict having been found accordingly, the Court refused a new trial.—*Edwards v. Bagster*, 2 M. & W. 221.

AMENDMENT.

1. Where a verdict was taken for the plaintiff, and all matters in difference in the cause were referred to an arbitrator, who certified, that for the justice of the case the record ought to be amended, by allowing the plaintiff to substitute a replication putting all the circumstances of the plea in issue; the Court held that they had no power to direct such an amendment.—*Cross v. Metcalfe*, 1 N. & P. 232.
2. In case for fraudulent misrepresentation, an amendment of the misrepresentation charged may be made at *Nisi Prius*, under the 3 & 4 W. 4, c. 42, s. 23.—*Mash v. Denham*, 1 M. & Rob. 442.
3. An amendment of a declaration will not be allowed under 3 & 4 W. 4, c. 42, s. 23, if it appears probable that the variance may have prevented the defendant from pleading a good bar to the action.—*Ivey v. Young*, 1 M. & Rob. 545.

ANNUITY.

(*Enrolment.*) A deed of separation, after reciting that differences subsisted between the husband and wife, and that they had agreed to live separate, and that the husband had agreed to give trustees, for the benefit of the wife, a life annuity for her maintenance, witnessed, that in consideration of 10*l.* paid by each of the trustees to the husband, and of the covenants thereafter contained, the husband granted to the trustees a life annuity of 200*l.* for the wife’s benefit; and there was a covenant by the trustees to indemnify the husband from the debts of the wife: Held, that the deed need not be enrolled under the 58 G. 3, c. 141, s. 2. (2 B. & C. 881; 4 Bing. 214; 3 B. & Ad. 602.)—*Carter v. Smith*, 6 N. & M. 480.

ARBITRATION.

1. (*Arbitrator’s authority.—Finality of award.—Time for setting aside award.*) Where in covenant, several breaches being assigned, a verdict was taken for the plaintiff on one issue, and damages assessed at 10*l.* subject to the award of an arbitrator, to whom the cause and all the matters in difference were referred, with power to direct what should be done be-

tween the parties, and with liberty to supply a defect in the record; and he assessed damages on the other issues also, and directed a verdict on them for the amount so assessed: Held, that he had thereby exceeded his authority, and that the award was bad.

Where two substantial matters are referred to an arbitrator, and he finds on one of them only, the award is bad altogether, as not being conclusive.

Where a cause and all matters in difference are referred, a motion may be made to set aside the award at any time during the next term after its publication: where the cause only is referred, and the arbitrator is put into the place of the jury, the motion must be made within the first four days.—*Hayward v. Phillips*, 1 N. & P. 288.

2. (*Award as to costs—Attachment.*) If an award directs costs to be paid in equal proportions by several persons, a separate attachment must be obtained against each for their non-payment.—*Gulliver v. Summerfield*, 5 D. P. C. 401.

3. (*Award—Excess of arbitrator's authority.*) If a cause is referred to an arbitrator, the costs to abide the legal event, it is an excess of authority to award a *stet processus* (5 B & Ad. 403; 10 Bing. 507; 2 C. & M. 722.)

Where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention on each of them is sufficiently clear from the general language of the award.—*Hunt v. Hunt*, 5 D. P. C. 442.

And see AMENDMENT, 1.

ARREST.

Where a defendant has been arrested on a *ca. sa.*, to execute which the officer has broken an outer door, the Court will discharge him out of custody on a summary application. (Bac. Abr. Execution, n. — Cowp. 1.)—*Hodgson v. Towing*, 5 D. P. C. 410.

ARSON.

An open shed in a farm yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, is an outhouse, within the meaning of the 7 & 8 G. 4, c. 30, s. 2.

To constitute a setting on fire, it is not necessary that any flame should be visible.—*Rex v. Stallion*, Moo. C. C. R. 398.

The prisoner was convicted on an indictment for setting fire, with intent to injure A. B. The property fired belonged to A. B. The jury found the intent to injure C. D.: Conviction held good.

An indictment under 7 & 8 G. 4, c. 30, s. 17, for setting fire to a stack of straw, is good, without stating any intent to injure.—*Rex v. Newill*, Moo. C. C. R. 458.

An unfinished building, intended as a cart-shed, which is boarded up on all its sides, and has a door with a lock to it, and the frame of a roof with loose gorse on it, because it is not yet thatched: Held to be a building, within 7 & 8 G. 4, c. 29, s. 44.—*Rex v. Worrall*, 7 C. & P. 516.

ASSAULT. See EVIDENCE, 7.

ATTACHMENT.

1. *Seemle*, where a plaintiff is entitled to an attachment, pursuant to the rule of H. T. 3 W. 4, against the sheriff for not obeying a judge's order in vacation to bring in the body, although the defendant is afterwards rendered in vacation, he is bound to apply for the attachment *promptly* in the following term.—*Rex v. Sheriff of Middlesex*, 5 D. P. C. 245.
2. It is no answer to a rule for an attachment, that the judge's order, which has been made a rule of Court, has not been personally served, if the rule itself has been regularly served.—*Greenwood v. Dyer*, 5 D. P. C. 255.
3. If a defendant will not take the copy of an award and rule, the other requisites of a service being complied with, it is sufficient for a rule nisi for an attachment.—*Ellis v. Giles*, 5 D. P. C. 255.
4. (*When to stand as security.*) A plaintiff has not lost a trial in a town cause, if he could have proceeded to trial at any time in the term next after the return of the writ; and therefore where a plaintiff might have proceeded to trial at the third sittings, though not at the first, he is not entitled to have the attachment stand as a security.—*Rex v. Sheriff of Shropshire*, in *Chappell v. Bowdler*, 5 D. P. C. 256.
5. (*For not obeying subpoena.*) The affidavit whereon to obtain an attachment for not obeying a subpoena, must state that the original subpoena was shown at the time of serving the copy. (1 C. & M. 87; 5 N. & M. 432.)—*Garden v. Cresswell*, 5 D. P. C. 461.

And see BAIL, 1, 8.

ATTORNEY.

1. (*Admission.*) A party intending to apply for an original admission as an attorney, must, under the rule of H. T. 6 W. 4, s. 5, cause the required notices to be delivered at the master's or prothonotary's office (as the case may be,) three *clear* days before the commencement of the term next preceding that in which he proposes to be admitted.—*In re Prangley*, 6 N. & M. 421.
2. (*Same.*) Where an articulated clerk to an attorney had legally changed his name shortly before the expiration of his articles, and in his notices of intention to apply for admission as an attorney, had described himself by his new name, without any notification of the change, the Court, upon motion on the first day of term, gave permission for him to be admitted on the last day of term; but required that a notice should be up till the end of the term with both names.—*In re Ridley*, 6 N. & M. 436.
3. (*Penalty for practising in County Court.*) An attorney who has neglected to take out his certificate in pursuance of the 37 G. 3, c. 90, s. 31, is not liable to the penalty imposed by the 12 G. 3, c. 13, s. 7, for practising in the County Court. (3 Ad. & E. 224; 1 B. & Cr. 254.)—*Hodkinson v. Mayor*, 1 N. & P. 397.
4. (*Privilege of attorney defendant.*) The privilege of an attorney defendant to be sued in his own Court, is not taken away by the Uniformity of

- Process Act, 2 W. 4, c. 39.—*Lewis v. Kerr*, 2 M. & W. 226; 5 D. P. C. 447.
5. (*Action on bill—Proof of delivery of bill—Pleading.*) In an action on an attorney's bill, non-delivery of the bill must be pleaded, or the plaintiff need not prove the delivery.—*Moore v. Dent*, 1 M. & Rob. 462.
 6. (*Summary jurisdiction over.*) The Court will not interfere summarily to compel an attorney to pay money pursuant to his undertaking to indemnify against costs, in an action where, at his instance, a party has allowed his name to be used as a plaintiff, without any interest in the matter.—*Exp. Clifton*, 5 D. P. C. 218.
 7. (*Same.*) The Court will not compel an attorney to answer the matters of an affidavit, merely because he has hired insufficient bail to justify in an action.—*Clifford v. Parker*, 5 D. P. C. 226.
 8. (*Admission.*) Under special circumstances, the Court allowed the name of a person applying for admission as an attorney to be introduced into the Master's list on the first day of term, although the notices had not been given "three days at least before the commencement of the term," pursuant to rule 5 of H. T. 6 W. 4.—*Exp. Blunt*, 5 D. P. C. 231.
 9. (*Jurisdiction over Welsh attorney.*) The Court of K. B. has no jurisdiction over an attorney of the Great Sessions in Wales while acting in that character, notwithstanding the provisions of the 11 G. 4 and 1 W. 4, c. 70, and although he has since become an attorney of the K. B.—*In re Williams*, 5 D. P. C. 236.
 10. (*Re-admission.*) Under special circumstances, an attorney was re-admitted without the usual term's notice, who had been off the roll from the 15th to the 17th November.—*Exp. Minchin*, 5 D. P. C. 253.
 11. (*Same.*) It is no objection to an attorney's being re-admitted without payment of fine or arrears of duty, that he has acted as an attorney in a borough Court, where persons not attorneys may practise, and has served process for other attorneys.—*Exp. Thomson*, 5 D. P. C. 275.
 12. (*Same.*) Where an attorney has obtained a rule for his re-admission, but ill health has prevented him from taking out his certificate, and he has not practised, he may be re-admitted in a subsequent year, on terms, without the usual notices.—*Exp. French*, 5 D. P. C. 374.
 13. (*Re-admission.*) The Court refused to re-admit an attorney who had discontinued practice for thirty years. (1 Chit. Rep. 558, n.)—*Exp. Billings*, 5 D. P. C. 395.

And see MALICIOUS ARREST.

AUCTIONEER.

- (*Liability of, for deposit.*) All matters in difference between G. and H. were referred, by a judge's order, to arbitration, and an agreement of reference was entered into between them, in which H. was described as the administrator of A., to whom certain leasehold premises, the right to which was in dispute, had belonged. The arbitrator directed the premises to be sold by an auctioneer, whose appointment was assented to by both

parties. G.'s attorney, who, at the time of the sale, was aware that H. had not taken out administration, became the purchaser, and paid a deposit to the auctioneer, it being understood, at the time of the sale, that H. would take out administration. H., however, afterwards refused to do so, and a good title was not made out: Held, that the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded.—*Duncan v. Cafe*, 2 M. & W. 244.

BAIL.

1. (*Bail-bond, when to stand as security.*) Whenever it appears, on the discussion of a motion to set aside a regular bail-bond or attachment, that the plaintiff has been prevented from trying his cause by the irregularity of the defendant's proceedings, he is entitled to have the bail-bond or attachment stand as a security, although it appear that the rule to set it aside might have been disposed of in time to allow the plaintiff to enter and try his cause at the regular time.—*Casley v. Binns*, 2 M. & W. 285.
2. (*Notice of bail by prisoner.*) In the Exchequer, a two days' notice of bail, given by a prisoner, must state that he is a prisoner. (1 C. & M. 335; 2 D. P. C. 229.)—*Poole's bail*, 2 M. & W. 312; 5 D. P. C. 449. *Secus* in K. B. see *Pierce's bail*, 5 D. P. C. 252.
3. (*Notice of bail.*) In a notice of bail the residence must be described in terms as that which he has occupied "for the last six months;" as the Court will not infer it from the mere statement of his residence.—*Holling's bail*, 5 D. P. C. 220.
4. (*Affidavit of sufficiency—Costs.*) The rule of H. T. 2 W. 4, s. 5, as to the addition of deponents, applies to affidavits of sufficiency made by bail, pursuant to rule 3 of T. T. 1 W. 4; and therefore, if it is omitted, the affidavit must be amended, and the defendant will not be entitled to the costs of justification.—*Brown's bail*, 5 D. P. C. 220.
5. The Court will not allow a defendant who is out of custody to be bailed before a magistrate in the country, but he must surrender in order to be bailed.—*Rex v. Wren*, 5 D. P. C. 222.
6. (*Transmission of the bail-piece.*) The rule of H. T. 2 W. 4, s. 14, as to the transmission of the bail-piece in the case of country bail, does not apply where bail has been put in in the country to set aside irregular proceedings on the bail-bond.—*Day v. Greenway*, 5 D. P. C. 243.
7. (*Alteration in bail-piece—Attachment.*) It is no objection to the justification of bail that an alteration has been made in the bail-piece in the name of one of the bail, if the officer taking the bail has placed his initials against the alteration.
The fact of an attachment having been obtained against the sheriff for not bringing in the body, is no objection to the justification of bail.—*Haywood's bail*, 5 D. P. C. 269.
8. (*Exception to—Attachment.*) Where the defendant has put in bail, the plaintiff must except to them before he can attach the sheriff for not bringing in the body, although the defendant has given notice of justifica-

tion. (1 H. Bla. 80, 106.)—*Rex v. Sheriff of London*, in *Tyler v. Still*, 5 D. P. C. 387.

9. (*Deposit in lieu of*.) The rule for taking out of Court money deposited by a defendant in lieu of bail, under 7 & 8 G. 4, c. 71, s. 2, where the defendant succeeds, is nisi in the first instance.—*Lover v. Tolmin*, 5 D. P. C. 388.
10. (*Notice of justification*.) One day's notice of justification of the same bail at chambers is sufficient.—*Wilson v. Hawkins*, 5 D. P. C. 436; *Key v. McIntyre*, *ib.* 453.
11. (*Discharge of by time given to principal—Waiver*.) Time was given to a defendant without consent of the bail; subsequently one of the bail applied to the plaintiff for further time: Held, that this amounted to a waiver.—*Spyer v. Carter*, 5 D. P. C. 448.

And see PRISONER, 3.

BANKRUPTCY.

(*Fraudulent preference*.) A banking firm was in insolvent circumstances, and about to stop payment. A., a partner in the firm, informed B. of the fact, in order that the private balance of C., B.'s father, might be drawn out of the bank; but desired him not to let it be known to D., a shareholder in an insurance company, which had also an account with the bank, as he, A., did not wish the directors to know of it. C.'s private balance was in consequence drawn out the next day. On the evening of that day A. informed C. of the state of the house. C., being a managing director of the insurance company, took measures by which the company's account was drawn out by a cheque upon the bank. Two days afterwards the house stopped: Held, that this was not a fraudulent preference of the insurance company. (5 Taunt. 539; 1 B. & Ad. 152; 1 Stark. 88.)—*Belcher v. Jones*, 2 M. & W. 258.

And see SHIPPING.

BIGAMY.

Indictment for bigamy, committed in one county, found by a jury of another where the prisoner was apprehended, must state that fact.—*Rex v. Fraser*, Moo. C. C. R. 407.

BILL OF EXCHANGE.

1. (*Effect of alteration of acceptance*.) An alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, if made without his privity.—*Desbrowe v. Wetherly*, 1 M. & Rob. 438; *Taylor v. Moseley*, *ib.* 439, n.
2. (*Notice of dishonour*.) If the notice of dishonour, sent to the drawer of a bill, arrives too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address. (R. & M. 249.)—*Siggers v. Brown*, 1 M. & Rob. 520; *Hewitt v. Thomson*, *ib.* 542.

And see TENDER; TROVER, 2.

BRIBERY.

(*Of voter under Municipal Corporation Act*.) Under the Municipal Corporation

Act, 5 & 6 Will. 4, c. 76, s. 54, the offence of corrupting a voter is complete where the bribe is offered and accepted, and the voter promises to vote in pursuance of the corrupt contract, although he may break his promise, or may never have intended to perform it; but where a bribe is offered, but not accepted, the offence is that of *offering to corrupt*; and it is for the jury to say whether there was a complete agreement or not.—*Harding v. Stokes*, 2 M. & W. 233.

BRIDGE.

(*Right of party chargeable ratione tenuræ to repair, to contribution—Manor—Evidence.*) Where a lord of a manor, bound by tenure to repair a bridge, has repaired it, he may recover contribution, in an action of assumpsit, from a person holding lands which were parcel of the demesnes of the manor at any time while the manor was so charged, in proportion to the value of the lands so held.

A survey taken by commissioners of the Crown when seised of a manor, was held admissible evidence to show what were the demesne lands of the manor at that time.—*Dimes v. Arden*, 6 N. & M. 494.

CENTRAL CRIMINAL COURT.

1. (*Jurisdiction of.*) Larceny committed on board an English ship lying in a river in China, is within the jurisdiction of the Central Criminal Court.—*Rex v. Allen*, Moo. C. C. R. 494; 7 C. & P. 664.
2. (*Same.*) The judges of the Central Criminal Court have no power, as such, to issue a habeas corpus or other process to bring in a party who is in custody of the Sheriff of Middlesex, in a civil suit, in order that he may be committed to Newgate to be tried in that Court for a misdemeanor; and the 4 & 5 W. 4, c. 36, s. 16, does not apply to such a case.—*Rex v. Morgan*, 7 C. & P. 642.

CERTIORARI.

1. (*To remove order of justices—Recognizances—Certiorari, when within time—Notice to justices.*) Where a parish prosecutes a certiorari to remove an order of sessions, the recognizance required by the 5 G. 2, c. 19, s. 2, to prosecute with effect, must be entered into by some one inhabitant on behalf of the rest of the parish, with two sureties. (4 T. R. 281.)

When the sessions commenced on the 5th April, and an order of sessions was made on the 7th, an application made at chambers on the 3d October, and allowed on or before the 7th, for a certiorari to remove an order of the justices, was held in time.

If a certiorari has been applied for in time, but the allowance of it is quashed for a defect in the recognizance, the Court, under circumstances, will send the writ down again to be properly allowed.

Seemle, a notice to the justices of the application for a certiorari, pursuant to 13 G. 2, c. 18, s. 5, signed "A. and B. attornies on behalf of the appellants," is sufficient.—*Rex v. Inhabitants of Abergele*, 1 N. & P. 235.

2. The writ of certiorari, at the instance of the defendant, is taken away by the 25 G. 2, c. 36, s. 10, in the case of an indictment for keeping a gaming-house.—*Rex v. Fox*, 5 D. P. C. 242.

CHARTER.

(*Construction of.*) Where a charter of Edw. 6 granted to the governors of a corporation the right of nominating and appointing, *und cum assensu majoris partis inhabitantium* of the vill of S., a chaplain to perform divine service in the said vill: Held, that a usage for the governors to nominate a chaplain, and to give notice to the inhabitants to meet at a future day, and to assent to or dissent from the nomination so made, was not inconsistent with the words of the charter.

A decree of the Lord Chancellor, in 1741, had declared the right of voting to be in the inhabitants paying rates and assessments, and the usage since that decree had been in accordance with it. An election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused; the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to show that the term "inhabitants," used in the charter, had a wider signification.—*Rex v. Governors of Sandford*, 1 N. & P. 328.

CHARTER-PARTY. See FOREIGN LAW, 2.

CHEQUE.

(*When it is payment.*) Where a debtor transmits to his creditor a cheque on his banker, the creditor is not bound to take it as payment, and may commence an action for the debt while the cheque is yet in his hands: *à fortiori*, where the cheque, though drawn for a less amount than the debt, was expressed to be for the *balance of account*.—*Hough v. May*, 6 N. & M. 535.

CLUB. See PRINCIPAL AND AGENT, 1.

COINING.

1. On a conviction for two separate offences of uttering counterfeit coin, in two counts, one judgment for two years' imprisonment, under 2 W. 4, c. 34, s. 7, was held bad.—*Rex v. Robinson*, Moo. C. C. R. 419.
2. In order to convict a prisoner under the 2 W. 4, c. 34, s. 10, of the felony of having in his possession a mould, on which was impressed the resemblance of the obverse side of a shilling, the jury must be satisfied that when the prisoner had it in his possession, the *whole* of the obverse side of the shilling was impressed on it.

But on an indictment on the same section for the felony of *making* a mould, "intended to make and impress the figure of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression.—*Rex v. Foster*, 7 C. & P. 494, 495.

COMPENSATION.

(*Under Railway Act.*) A railway act authorized the company to take lands of individuals, making compensation for the same, and enacted, that if disputes should arise as to the price, the value should be settled by a jury; and in case the jury should give a greater sum than had been offered

by the company, "all the costs of summoning the jury, and the expenses of witnesses," were to be defrayed by the company; but if a less sum, a moiety to be defrayed by the other party; and another clause enacted, that such party should enter into a bond to pay "his proportion of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and expenses of witnesses," in case any portion of such costs should fall on him: Held, that the words "the costs of taking such verdict," did not mean the costs of trial; and therefore that counsel's fees, and the attorney's costs in preparing for and attending the trial, were properly disallowed.—*Rex v. Gardner*, 1 N. & P. 308.

And see LONDON DOCK ACT.

CONCEALMENT OF BIRTH.

If the mother causes the body of her child to be secretly buried, with a view to conceal the birth, she may be convicted of concealment under the 9 G. 4, c. 31, s. 24, though she may have previously allowed the birth to be known to some persons.—*Rex v. Douglas*, Moo. C. C. R. 480; 7 C. & P. 644.

COPARCENERS.

(*Effect of partition.*) A. and B., being seised of land in coparcenary, B. conveyed his moiety to a purchaser in fee. The purchaser and A., the other parcener, made partition by lease and release, and conveyed the whole to H. and his heirs, as to one portion, to the use of such purchaser in fee, and as to the other portion to the use of A. in fee: Held, that A.'s portion remained descendable to his heir *ex parte maternâ*. (Com. Dig. Parceners, C. 15; 3 P. Wms. 170, n.; 3 Ves. jun. 199; 8 Ves. jun. 106; 7 T. R. 416.)—*Doe d. Crosthwaite v. Dixon*, 1 N. & P. 255.

COPYHOLD.

(*Admittance.*) The legality of the title of the lord or steward who admits a copyholder is immaterial, provided the admittance is in pursuance of a surrender, and not of a voluntary grant from the lord.—*Doe d. Burgess v. Thompson*, 1 N. & P. 215.

CORONER.

(*Inquisition—Names of jurors.*) If several jurors on a coroner's inquisition have the same Christian and surname, it is not necessary in the caption to distinguish them by abode or addition.

An inquisition for manslaughter, which charges that the principals in the second degree were "feloniously present, then and there abetting, aiding, and assisting," is bad, as the word "feloniously" extends only to the word *present*.—*Rex v. Nicholas*, 7 C. & P. 538.

COSTS.

1. (*Under 43 G. 3, c. 46.*) Arrest for £20: 2s. 1d. for goods sold; plea, infancy; replication, that the goods were necessaries. At the trial, the plaintiff proved the delivery only of some of the articles in his bill of particulars, and had a verdict for 10*l.* On an affidavit of the defendant that he never owed the plaintiff 20*l.*, the Court gave him costs under 43 G. 3,

- c. 46, though the plaintiff swore that all the articles in the bill of particulars were delivered to the defendant.—*Bullantine v. Taylor*, 1 N. & P. 219.
2. (*Of first trial.*) Where, a verdict having been found for the plaintiff, a new trial was granted, on the ground that evidence had been improperly received, and the defendant then, after the plaintiff had applied for a special jury, withdrew his plea, and suffered judgment by default, and the damages were assessed: Held, that the plaintiff was not entitled to the costs of the first trial. (2 D. P. C. 415; 2 C., M. & R. 232.)—*Peacock v. Harris*, 1 N. & P. 240.
3. (*Of several issues.*) To a declaration in assumpsit for money had and received, the defendant pleaded, as to all except 3*l.* 5*s.*, non assumpsit; as to all except 3*l.* 5*s.*, a set-off; and as to 3*l.* 5*s.*, payment of that sum into Court. The plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit, except as to the 3*l.* 5*s.*, and took that sum out of Court: Held, that the defendant was entitled to his costs on the two first issues.—*Goodee v. Goldsmith*, 2 M. & W. 202; 5 D. P. C. 288.
4. (*Treble costs under Highway Act.*) By the 5 & 6 W. 4, c. 50, the 13 G. 3, c. 78, which gave treble costs to parties sued for anything done in pursuance of the act, on a nonsuit, was repealed, the new act giving, in such case, costs only as between attorney and client. A plaintiff, who sued parish officers for an act done under the 13 G. 3, c. 78, became nonsuit at a trial which took place before the 5 & 6 W. 4, c. 50, came into operation, but judgment was not signed till after: Held, that the defendants were not entitled to treble costs.—*Charrington v. Meatheringham*, 2 M. & W. 228; 5 D. P. C. 464.
5. (*Security for.*) The Court will not superadd to a rule for security for costs, the term that the defendant should be at liberty to sign judgment as in case of a nonsuit, if the security were not given within a limited time.—*Kelly v. Brown*, 5 D. P. C. 264.
6. (*Same.*) It is not necessary to make a demand previously to moving for security for costs, unless it is intended to be part of the rule that proceedings be stayed in the meantime.—*Fountain v. Steele*, 5 D. P. C. 331.
7. (*Taxation.*) The Court will review the decision of the Master as to the number of counsel he allows on taxation, under special circumstances.—*Grindall v. Godman*, 5 D. P. C. 378.
8. (*Same.*) Where the writ is issued for a sum above 20*l.*, and before execution the plaintiff gives the defendant credit for cross-demand, which has not been pleaded, and thereby reduces the debt to a sum under 20*l.*, the Master should tax the costs on the reduced scale. (Patteson, J., dissentiente.)—*Savage v. Lipscombe*, 5 D. P. C. 385.
9. (*Of first trial.*) Where a juror was withdrawn, and the cause referred, but no award made, and the cause being taken down again, the plaintiff

succeeded, he was held not entitled to the costs of the first trial. (6 T. R. 71; 1 D. P. C. 282; 3 D. P. C. 372; 4 D. P. C. 575.)—*Thomas v. Lewis*, 5 D. P. C. 395.

10. The Court would not compel a third party to pay the costs of a defence, on the mere allegation of *belief* that it was carried on at his instance.—*Blewitt v. Tregonning*, 5 D. P. C. 404.
11. (*Taxation—Delivery of copy of bill.*) The rule of the Exchequer, which requires a copy of the bill of costs, and affidavit of increase, to be delivered to the attorney on the other side a day previous to taxation, is imperative, unless waived by the other party.—*Wilson v. Parkins*, 5 D. P. C. 461.
12. (*Certificate under 43 Eliz.*) After the trial, the judge (Patteson, J.,) certified under the 43 Eliz., c. 6, to deprive the plaintiff of costs; but in the ensuing term, new facts, which did not appear before him at the trial, being laid before him on affidavit, he made an order to annul the certificate.—*Anderson v. Sherwin*, 7 C. & P. 527.

And see WRIT OF TRIAL.

COUNTY RATE.

(*Inspection of, by rate-payers.*) The rate-payers of a county have not, either at common law or by statute, any right to inspect and copy the bills of charges of county officers, when they are deposited with the clerk of the peace among the county records, in pursuance of the 12 Geo. 2, c. 29, s. 8. The right of inspection is confined to the justices of the peace for the county. (4 B. & C. 891; 5 Ad. & E. 500.)—*Rex v. Justices of Staffordshire*, 1 N. & P. 260.

COURT OF REQUESTS ACTS.

(*West Brixton Court of Requests Act.*) A suggestion may be entered on the roll to deprive the plaintiff of costs under the West Brixton Court of Requests Act, 46 Geo. 3, c. 88, where the debt is under 5*l.*; and it is not necessary that the *plaintiff* should be resident within the jurisdiction.—*Hamley v. Hutton*, 5 D. P. C. 332.

CRIMINAL INFORMATION.

A rule nisi for a criminal information for a libel was discharged on an affidavit made by a person who swore to the truth of the libel. This person was indicted for perjury, the bill was found, and he absconded. It appeared from the affidavits of several persons, that the former affidavit was entirely untrue. The Court, under these circumstances, granted another rule nisi for a criminal information, and made it absolute.—*Rex v. Eve*, 1 N. & P. 229.

CUSTOMS' ACTS.

Licences granted by the Commissioners of Customs to custom-house agents, under the 6 Geo. 4, c. 107, s. 139, and bonds taken for the faithful performance of their duties, are continued in force by the 3 & 4 Will. 4, c. 53, s. 144, notwithstanding the repeal of the former act by the 3 & 4 Will. 4, c. 50.—*Rex v. Atkins*, 2 M. & W. 289.

CUTTING AND MAIMING.

1. The prisoner was indicted for cutting and maiming, with intent to prevent his apprehension for an offence for which he was liable to be apprehended, to wit, for that he did violently assault and beat A. B. The prisoner was taken before the magistrates by the prosecutor, on a warrant directed to him, for an assault on A. B., and was ordered to find bail, which he refused to do, and while the commitment was being made out, he escaped. The prosecutor, by the verbal directions of the magistrates, pursued the prisoner, and in attempting to apprehend him, was cut by him: Held well convicted, and that the offence was rightly described.—*Rex v. Williams*, Moo. C. C. R. 387.
2. A constable, who had verbal directions from the magistrates to apprehend all persons playing at *thimble-rig*, attempted to apprehend the prisoner and his companions playing that game in a public fair. The constable, with assistance, took one of the party, but the prisoner and the others rescued him, and got off. In the evening of the same day, the constable found the prisoner in a public-house, not having been able to find him before, and endeavoured to apprehend him, stating that it was for what he had been doing in the fair. The prisoner escaped into an outhouse, and the constable called the prosecutor to his assistance, and together they broke open the door, and endeavoured to take the prisoner, who thereupon stabbed the prosecutor. A conviction for feloniously cutting and maiming was held wrong.—*Rex v. Gardener*, Moo. C. C. R. 390.
3. A conviction on an indictment for maliciously cutting a police officer, with intent to resist and prevent the arrest of the prisoner for a certain offence for which he was liable by law to be apprehended and detained, viz. for committing damage and injury upon certain plants and roots growing in a garden, &c., held good.—*Rex v. Fraser*, Moo. C. C. R. 419.

DEBT FOR RENT.

(*Plea to—Tenancy in common.*) To a declaration in debt for rent, stating that the plaintiff and one J. S. deceased, were seised in fee, and demised to the defendant from year to year, rendering a certain rent to the plaintiff and J. S., which had fallen into arrear since the death of J. S., it is a good plea, on general demurrer, that the plaintiff and J. S. were tenants in common. (1 Ad. & E. 759; 3 N. & M. 646; Carth. 289.)—*Burne v. Cambridge*, 1 M. & Rob. 539.

DEBTOR AND CREDITOR.

(*Assignment for the benefit of creditors—Illegal trading.*) An assignment by a trader of his premises and effects to a creditor, upon trust to dispose of the trade, or carry it on for the benefit of such creditors as will execute the trust-deed, and to distribute the proceeds among such creditors, and to pay the surplus to the trader, is void as against a creditor not executing it, on the ground that by executing the deed the creditors would render themselves liable in respect of the future trade.

But it was held to be no objection to such assignment, that at the time of its execution, the assignor, whose trade partly consisted in selling ex-

ciseable articles, had no licence, and was thereby liable to a penalty.—*Owen v. Body*, 6 N. & M. 448.

And see FOREIGN LAW, 1.

DEED.

(*Attestation, what is—Corporate seal.*) On a deed sealed with the corporate seal of the Governor and Directors of the Bank of England, these words were written round the seal: "Sealed by order of the Governor and Court of Directors of the Bank of England, on, &c, J. K. Secretary:" Held, that J. K. was not to be considered as an attesting witness.

And *quere*, whether a person who formally attests the affixing of the seal of a corporation to a deed, need be called as an attesting witness.—*Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410; 6 N. & M. 539.

DEED OF DISPOSITION. See MANDAMUS.

DEED OF SEPARATION. See ANNUITY.

DEVISE.

1. (*What passes a fee.*) A testator, seised of freehold land, after giving several pecuniary legacies, devised as follows: "I give to W. and A. his wife, for their natural lives, all my messuages, lands, hereditaments, and premises whatsoever, in the city of N., or elsewhere in the kingdom of Great Britain; and from and after the decease of the said W. and A., my will and mind is, that the said messuages, &c. shall be equally divided unto and amongst such of the children of W. and A. as shall be then living." The will then disposed of the residue of the personal estate: Held, that the children took only life estates as tenants in common, and not estates in fee. (3 Burr. 1895; 3 B. & Ad. 473.)—*Silvery v. Howard*, 1 N. & P. 351.

2. (*What passes a fee—Adverse possession.*) Devise as follows: "I give to my wife, her heirs and assigns, for ever, all the residue of my personal estate, whatsoever and wheresoever; and also all my right, title, and interest, in all and every sum and sums of money whatever, which now is, are, or shall be due to me on any bill, bond, or other securities. I also make my wife full and sole executrix of the house in G.:" Held, that by this latter clause a fee simple in the house passed to the wife.

The widow continued to reside in the house more than twenty years after her husband's death: Held, that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. (5 T. R. 716; 11 East, 246; Prec. in Chan. 471; Noy, 48; 12 Mod. 593; 4 Russ. 348.)—*Doe d. Hickman v. Haslewood*, 1 N. & P. 352; and see *Doe d. Pratt v. Pratt*, ib. 366.

EASEMENT.

(*What is an easement, and not a profit à prendre.*) A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient enjoyment of his messuage, is an easement, and not a *profit à prendre* in the soil of another. (6 Rep. 59 b; 2 H. BL 393; 3 Ad. & E. 554.)

But if such right were a *profit à prendre*, the allegation that the water

was to be for the more convenient use of the messuage, is a sufficient limitation of the right claimed, on general demurrer. (Cro. Eliz. 458).—*Manning v. Wadale*, 1 N. & P. 172.

ECCLESIASTICAL COURT.

(*Habeas corpus* from.) *Seemle*, that the Court of King's Bench will not grant a habeas corpus to remove a defendant out of custody, on a writ de contumace capiendo, for the purpose of doing penance before an ecclesiastical court, although the Lord Chancellor will.—*Ex parte Strong*, 5 D. P. C. 213.

EJECTMENT.

1. (*Staying proceedings in second ejectment.*) A. and B. jointly brought two ejectments on the same title, one against C. and the other against D., and recovered in both. In a third, brought by A. and B., on the same title, against C. and D., the defendants had a verdict, and taxed their costs, but never made any express demand of them. The costs were never paid. Four years after the trial of the first cause, B. released to C. and D. his claim to the premises in dispute, in consideration of money, and of a covenant by them to suspend their claim against B. for costs. Afterwards A. died, and his son brought ejectment against C. and D. on the title relied upon in the former actions. On motion to stay proceedings till payment to C. and D. of the costs recovered by them: Held, that the facts of this case did not take it out of the ordinary rule, and that the defendants were entitled to the stay of proceedings.—*Doe d. Rees v. Thomas*, 4 Ad. & E. 348.
2. (*Demand of possession, when necessary.*) Where J., who was tenant at will to W., died, and the defendant, who was heir at law to J., entered into possession, and claimed the land as his own: Held, that the devisees of W. might bring ejectment against the defendant, without notice to quit or demand of possession.—*Doe d. Burgess v. Thompson*, 1 N. & P. 215.
3. (*Under 1 Geo. 4, c. 87.*) It is immaterial, in an application under the 1 Geo. 4, c. 87, s. 1, that the lessor of the plaintiff is the original lessee, and the tenant his sub-lessee.—*Doe d. Wutts v. Roe*, 5 D. P. C. 213.
4. (*Service.*) An acknowledgment by the tenant in possession, after the commencement of the term, that the declaration has come to his hands, is not sufficient even for judgment against the casual ejector, unless the acknowledgment is that he received it before the term, although his wife acknowledges that it came to *her* hands on the day before term.—*Doe d. Finch v. Roe*, 5 D. P. C. 225.
5. (*Same.*) In order to obtain judgment against the casual ejector, it is necessary to depose to a service on the *tenant in possession*; it is not sufficient to depose to service on a party who appears, from facts set forth in the affidavit, to be the tenant in possession.—*Doe d. Jones v. Roe*, 5 D. P. C. 226.
6. (*Same.*) Service of a declaration in ejectment, the notice of which is directed to A. B., is not good on C. D., though C. D. is tenant of a part of the premises.—*Doe d. Smith v. Roe*, 5 D. P. C. 254.
7. (*Same.*) If the service in ejectment is quite regular, the papers should at

once be taken to the Rule Office, without applying to the Court.—*Doe d. Welchin v. Roe*, 5 D. P. C. 271.

8. (*Title of declaration.*) A declaration in ejectment, entitled "6 W. 4," instead of "7 W. 4," is irregular.—*Doe d. Gowland v. Roe*, 5 D. P. C. 273. But the defect is cured, if from the date of the notice the tenant must be aware of the term in which he is to appear.—*Doe d. Wills v. Roe*, ib. 380.

9. (*Under 1 Geo. 4, c. 87—Affidavit.*) In moving for the ordinary landlord's rule, under the 1 Geo. 4, c. 87, s. 1, the affidavit must have the name of the lessor of the plaintiff in its title.—*Doe d. Watson v. Roe*, 5 D. P. C. 389.

10. (*Service.*) Where the service has been on a surviving joint tenant, who is the sole tenant in possession, the Court will only allow judgment to be signed against him, though the name of the deceased joint tenant has been introduced into the proceedings.—*Doe d. Hewson v. Roe*, 5 D. P. C. 404.

11. (*Same.*) In ejectment for property in the possession of overseers of the poor, service on one is not sufficient to obtain judgment against all.—*Doe d. Weeks v. Roe*, 5 D. P. C. 405.

12. (*Judgment against casual ejector—Title of affidavit.*) Where a declaration in ejectment contains both joint and several demises, it is sufficient to entitle the affidavit, on motion for judgment, as being on the several demises of all the parties, without noticing which are joint and which several. (2 D. P. C. 55.)—*Doe d. Barles v. Roe*, 5 D. P. C. 447.

EMBEZZLEMENT.

1. Indictment against the clerk of a savings' bank for embezzlement: Held, that he was properly described as clerk to the trustees, though elected by the managers.—*Rex v. Jenson*, Moo. C. C. R. 435.

2. Since the 7 & 8 Geo. 4, c. 29, s. 48, an indictment for embezzlement may be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for.—*Rex v. Grove*, Moo. C. C. R. 447; 7 C. & P. 635.

3. It is embezzlement in a member of and secretary to a society, fraudulently to withhold money received from a member to be paid over to the trustees; and he may be stated to be clerk and servant of the trustees, and the money may be properly stated to be their property, though the society be not enrolled, and though the money ought, in the ordinary course, to have been received by a steward.—*Rex v. Hall*, Moo. C. C. R. 474.

ESCAPE. See SHERIFF, 2.

ESCHEAT.

Where land descends to the son of an illegitimate father, who was the purchaser of the land, and the son dies intestate and without issue, such land does not descend to his heir *ex parte materná*, but escheats to the Crown, notwithstanding the statute 3 & 4 W. 4, c. 106, s. 2.—*Doe d. Blackburn v. Blackburn*, 1 M. & Rob. 547.

EVIDENCE.

1. (*Evidence of appointment of public officer—Competency of witness—What sufficient search to let in secondary evidence.*) To an action brought by the vestry clerk of the parish of St. Pancras, under a local act, the defendant pleaded that the plaintiff was not vestry clerk: Held, that evidence of his acting as vestry clerk was sufficient *prima facie* evidence of his appointment. Held also, that one of the directors of the vestry was a competent witness for the plaintiff.

A cheque, drawn on account of the parish, was delivered to A., who was then the paying clerk of the parish. It was shown that the bankers of the parish, on the same day, paid a sum of that amount, and that their custom was to return the cancelled cheques to the paying clerk, and that they were deposited in an apartment in the workhouse. A. having gone out of office, application was made to his successor at that place, for inspection of the cheques. He handed to the witness several bundles, which he searched, without finding the cheque in question: Held, a sufficient search to let in secondary evidence of its contents.—*M'Gahey v. Alston*, 2 M. & W. 206.

2. (*Probate.*) The probate of a will is not evidence to prove declarations of the testator, as reputation, in a question of pedigree. (Bull. N. P. 246).—*Doe d. Wild v. Ormerod*, 1 M. & Rob. 466.
3. (*Depositions in Chancery.*) In an issue from Chancery, between A. and B., depositions produced in Chancery, by B., in a suit of C. against B., are inadmissible.—*Atkins v. Humphreys*, 1 M. & Rob. 523.
4. (*Declarations of testator.*) The declarations of a testator are admissible where a will is disputed on the ground of fraud, forgery, or circumvention.—*Doe d. Ellis v. Hardy*, M. & Rob. 525.
5. (*Ancient map.*) In an action for breaking floodgates, the defendant justified as lessee of a mill, which he held of the Bishop of W. For the defendant, old leases of the mill, granted by a Bishop of W., were produced from the bishop's registry, and read in evidence; and it was proposed to put in an old map of the place in question, brought from the same custody: Held, not admissible. The only case in which a map of the property is receivable, is where it is undisputed that at the time it was made the property belonged to a person from whom both parties claim.—*Wakeman v. West*, 7 C. & P. 479; *Doe d. Hughes v. Lakin*, *ib.* 481.
6. Where a witness refreshes his memory as to a particular fact by a memorandum, it must be produced.—*Howard v. Canfield*, 5 D. P. C. 417.
7. (*In mitigation of damages.*) A. having written a novel, B. published, in the form of a critique on it, a libel on A. and his family, for which A. beat him. B. brought an action for the assault, and A. a cross-action for the libel: Held, that in the action for the assault, the libel might be given in evidence in mitigation of damages.—*Fraser v. Berkeley*, 7 C. & P. 621.

And see LANDLORD AND TENANT, 1; LIBEL, 2, 3; SLANDER.

EVIDENCE, IN CRIMINAL CASES.

1. (*Confession.*) The confession of a girl, fifteen years old, produced by

many applications by the prosecutor's relations, amounting to threats and promises, held not receivable.—*Rex v. Simpson*, Moo. C. C. R. 410.

2. (*Confession*.) A prisoner charged with murder, being a few days short of fourteen years old, was told by a man who was present when he was taken up, but not a constable, "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of God." Prisoner in consequence made certain statements: Held, *strictly* admissible.—*Rex v. Wild*, Moo. C. C. R. 452.
3. (*Same*.) A confession obtained from a servant, through hopes and threats held out by the wife of the master and prosecutor, is inadmissible.—*Rex v. Upchurch*, Moo. C. C. R. 465.
4. (*Dying declarations*.) Dying declarations *in favour* of the party charged with the death, are admissible in evidence.—*Rex v. Scaife*, 1 M. & Rob. 551.
5. (*Confession*.) When the prisoner was taken before the magistrate, the prosecutor said, in the prisoner's hearing, that he considered him as the tool of G.; the magistrate then told the prisoner to be sure to tell the truth; upon this the prisoner made a statement: Held, admissible.—*Rex v. Court*, 7 C. & P. 486.
6. (*Same*.) The prosecutor said to the prisoner, "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing:" Held, that a statement thereupon made by the prisoner was inadmissible.—*Rex v. Partridge*, 7 C. & P. 557.
7. (*Same*.) The constable who apprehended a prisoner for larceny asked him what he had done with the property, and said, "You had better not add a lie to the crime of theft." A confession thereupon made to the constable was held inadmissible.—*Rex v. Shepherd*, 7 C. & P. 579.

EXECUTOR AND ADMINISTRATOR.

(*Set-off against executor of debts due from testator*.) A debt due from the testator to the defendant cannot be set off to a declaration for money had and received to the use of the plaintiff as executor. (Willes, 103, 264 n.)—*Schofield v. Corbett*, 6 N. & M. 527.

FALSE PRETENCES.

Indictment for falsely pretending to the prosecutor, whose mare and gelding had strayed, that he, prisoner, would tell him where they were if he would give him a sovereign down. The prosecutor gave the sovereign, but the prisoner *refused* to tell: Held that the conviction was bad; the indictment should have stated that he pretended he knew where they were.—*Rex v. Douglas*, Moo. C. C. R. 462.

FORGERY.

1. Forging an order from a magistrate to a gaoler, to discharge a prisoner as upon bail having been given, is forgery at common law.—*Rex v. Harris*, Moo. C. C. R. 393.
2. Knowingly selling plate with the King's mark forged upon it, is not capital, but only subject to transportation.—*Rex v. Hope*, Moo. C. C. R. 396.
3. An indictment under the 1 W. 4, c. 66, s. 3, for uttering a forged bill of

exchange, is not supported by proof of uttering a bill of which the acceptance only is forged. The indictment must charge the forged acceptance.—*Rex v. Horwell*, Moo. C. C. R. 405.

4. The prisoner, a pay-serjeant of the artillery, obtained from the paymaster a receipt for a sum of money as part of subsistence of a company for the month of May. He afterwards erased *May* and inserted *June*, and gave the receipt to a tradesman, who, according to the usual practice, advanced the sum to the prisoner, and sent the receipt to the agent of the regiment, who paid the amount. An indictment for forgery, describing the instrument as a receipt, was held good.—*Rex v. Hope*, Moo. C. C. R. 414.
5. Indictment for forging an order for the payment of money. The instrument was an order to pay the prisoner or order the sum of 4*l.* 5*s.*, being a month's advance on an intended voyage to Quebec, in the ship *Mary Anne*, as per agreement with G. M., master. In the margin of the order the prisoner had written, "On receiving this cheque I agree to sail, and to be on board within sixteen hours from the date of this cheque." Held, an order for the payment of money within the meaning of the statute 1 W. 4, c. 66, s. 3.—*Rex v. Bamfield*, Moo. C. C. R. 416.
6. Indictment for uttering a forged bill of exchange, set out, "à 4 mois de date par cette lettre de change, à l'ordre de nous-même, la somme de 500 *livres* sterling," and translated "at 4 months' date by this bill of exchange, to the order of ourselves, the sum of five hundred pounds sterling:" Held good.—*Rex v. Szudirskie*, Moo. C. C. R. 429.
7. Indictment for forging an order for relief to a discharged prisoner, under 5 Geo. 4, c. 85, being in many instances ungrammatical and at variance from the act: Held bad.—*Rex v. Donnelly*, Moo. C. C. R. 438.
8. A count in forgery, setting out as an acquittance an invoice of goods sold, with the word *settled* at the foot, and signed with a name in full: Held good, without any averment of the meaning of the word *settled*.
A count charging the uttering of a forged receipt simply, is good.
If a person gives his employer a forged receipt for money, with intent to make the latter believe that money already obtained has been applied in a certain way, he is guilty of uttering, though there is no such person as that whose receipt it purports to be.—*Rex v. Martin*, Moo. C. C. R. 483; 7 C. & P. 549.
9. It is forgery for a person having authority to fill up a blank acceptance for a certain sum only, to fill it up for a larger sum.—*Rex v. Hart*, Moo. C. C. R. 486; 7 C. & P. 652; and see *Rex v. Atkinson*, 7 C. & P. 669.
10. (*Indictment—Forgery on joint stock bank.*) *Quere*, whether the statute 7 Geo. 4, c. 46, is imperative that forgeries on joint stock banks *must* be laid with intent to defraud one of their registered officers, or whether it is sufficient to lay the intent to defraud A. and others. But *semble*, that the latter mode is good.—*Rex v. Burgiss*, 7 C. & P. 490; *Rex v. James*, *ib.* 553.

FOREIGN LAW.

1. To an action of *assumpsit* against the defendant as acceptor of several bills of exchange, he pleaded, that after the accepting of the bills, and after the time of payment, the defendant being resident in Scotland, in consideration that certain of his creditors should forbear to sue him, made his deed, stamped and attested according to the law of Scotland, whereby he assigned his personal property in Scotland for the benefit of his creditors; that notice of the deed was given to the plaintiff, and that by his writing signed by him, and which by the law of Scotland was valid and effectual in that behalf, he, the plaintiff, nominated A. B. as his attorney, to concur in and adopt the deed, and receive the dividends; that A. B. had adopted the deed and attended meetings of the creditors; that divers other creditors of the defendant had accepted the assignment in satisfaction of their debts; that the causes of action arose before the execution of the deed; and that sufficient money had become available under the deed to pay all the creditors; and that all and singular the proceedings aforesaid were pursuant to and in conformity with the law of Scotland; whereby and by reason of the premises, the defendant was absolutely discharged from the cause of action. Replication, that the defendant is not discharged *modo et formâ*. Held, first, that by this plea the law of Scotland was put in issue: secondly, that it did not disclose a defence by the law of England, as it did not appear that the plaintiff had executed the deed, or induced any other creditor to do so, or in any way precluded himself from suing on the original debt. — *Woodham v. Edwards*, 1 N. & P. 207.

2. (*Evidence of contract of charter-party made abroad.*) A charter-party was entered into at Java. By the law of Holland, which is in force there, the parties, on entering into such a contract, go before a notary public; he makes an entry in his books, which the parties sign, and he makes out copies from time to time, when requested, which he delivers to the parties. These copies are received in evidence in the Courts of Holland, but at Java the notary's book itself must be produced: Held, that the copies could not be received in evidence in the Courts in England (no proof being given when they were made), either on the ground of the notary's being a public officer, whose duty it was to make copies, or of his being the agent of the parties, by whose acts they had agreed to be bound. (6 M. & Sel. 34, 39.)—*Brown v. Thornton*, 1 N. & P. 339.

FRAUDS, STATUTE OF.

- (*Parol contract for sale of interest in land, when avoided.*) Where a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close wherein it grew, for the purpose of cutting and carrying it away: Held, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for that this was, in substance, an action charging the defendant on the contract, within s. 4 of the Statute of Frauds.

A contract for the sale of an interest in land, without a note in writing, may operate as a *licence*, so as to excuse the entry of the purchaser on the

land, but it cannot be made available in any way as a contract. (6 East, 611; 7 T. R. 201; 10 B. & Cr. 664.)—*Carrington v. Roots*, 2 M. & W. 248.

GRAND JURY.

(*Formation of*.) A grand jury ought not to consist of more than 23 persons.

But where a greater number are sworn on a grand jury, and a bill of indictment is found by them, to which the defendant pleads and is found guilty, the Court of K. B. will not on motion quash the indictment. The defendant may, if the fact of such greater number appears on the caption of the indictment, bring error in law; if it does not, he may bring error in fact. (Selw. N. P. 1066; 2 Hawk. P. C. 299, 651; 2 Burr. 1088; 2 Hale, P. C. 154, 161; Co. Litt. 126 b.)

The Court will not receive an affidavit of a grand juror as to what passed in the grand jury room, on the subject of a bill of indictment.—*Rex v. Marsh*, 1 N. & P. 187.

HABEAS CORPUS.

(*Service on party abroad*.) Where a writ of habeas corpus had been served on a party in France, and not obeyed, the Court refused to grant a rule absolute in the first instance for an attachment against such party, though the proceeding was recognized and ordered to be obeyed by the French tribunals; nor would the Court grant its warrant to apprehend the party for his contempt, under the 56 Geo. 3, c. 100, s. 2.—*Exp. Wyatt*, 5 D. P. C. 389.

HALF PAY. See PENSION.

HIGHWAY.

1. (*Order for stopping up*.) An order of justices, under 55 Geo. 3, c. 68, stopping up more than one highway, is void. So is such an order stopping up part only of a highway. And justices have no authority to narrow a highway. (1 East, 64; 10 B. & C. 477.)

Semble, justices have no power to stop up a road out of the division or hundred for which they act.—*Rex v. Inhabitants of Milverton*, 1 N. & P. 179.

2. (*Indictment for non-repair—Pleadings*.) In a plea by a parish to an indictment for non-repair of a highway, the defendants must show, not merely that they are not liable, but who is liable to repair.

A plea to such indictment alleged, that within the parish, from time immemorial, there was a township E.; that part of the highway was within E.; and that the inhabitants of such township, from time immemorial, ought to have repaired, and still of right ought to repair, all the common highways within the said township that would otherwise be repairable by the inhabitants of the parish at large, and that the inhabitants of the parish had not repaired, and ought not to repair, the highway within the township. The plea concluded by stating, that by reason of the premises, the inhabitants of the township ought to have repaired the highway, and that the inhabitants of the parish ought not to be charged with the repairing: but it did not state that the road was one which, but for

the custom, the parish would be liable to repair. The replication took issue on the custom. After verdict for the defendants: Held, that the crown was not entitled to judgment *non obstante veredicto*, because it did not appear that the parish was liable; but that for want of the above averment the judgment ought to be arrested. (1 B. & Ald. 348; 2 Wms. Saunders, 159, c.; 1 Sid. 140; 1 Mod. 112.)—*Rex v. Inhabitants of Eastington*, 1 N. & P. 193.

3. The Court of K. B. confirmed its former judgment in the case of *Rex v. Cumberworth*, 3 B. & Ad. 108.—*Rex v. Inhabitants of Cumberworth*, 1 N. & P. 197.

4. (*Indictment for obstructing—Costs—Certiorari.*) The Court of K. B. cannot grant the prosecutor of an indictment for obstructing a highway his costs at sessions, which have been rendered useless in consequence of the defendant obtaining a certiorari for the removal of the indictment, no notice of the writ having been given until after the defendant had given notice of trial, and the expenses had been incurred, although the writ had issued long before. (1 B. & C. 143; 13 Price, 449; 1 Ad. & E. 603.)—*Rex v. Higgins*, 5 D. P. C. 375.

And see *COSTS*, 4.

HUSBAND AND WIFE.

1. (*Liability of husband for necessaries to wife.*) A husband, who had separated from his wife, agreed that a deed of separation should be prepared and executed: Held, that the husband was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared and executed, in the absence of any promise by him to pay that expense.—*Ladd v. Lynn*, 2 M. & W. 265.

2. (*Liability of husband for money lent to wife.*) In the absence of an express promise, *assumpsit* is not maintainable against a husband for money either lent to the wife to conduct, or actually laid out by a stranger in conducting, at the wife's request, an indictment against the husband for an assault on the wife. (3 Camp. 326; 1 M'Cl. & Y. 269; 1 P. Wms. 483.)—*Grindell v. Godmand*, 1 N. & P. 168.

And see *INSOLVENT*, 2.

INDICTMENT.

1. (*Conclusion contra formam statuti.*) It is no objection to a conviction of manslaughter, on an indictment for murder, that the indictment does not conclude *contra formam statuti*.—*Rex v. Chatburn*, Moo. C. C. R. 403; *Rex v. Rushworth*, ib. 404; *Rex v. Berry*, 1 M. & Rob. 463.

2. (*Joinder of counts against accessories.*) A count charging A. and B. with stealing, and C. with receiving part of the stolen property, and D. with receiving other part, may be joined with a count charging C. and D. with the substantive felony of jointly receiving the whole, and with counts charging C. and D. separately with the substantive felony of each receiving part; and it will be no objection that C. and D. each received part unconnectedly with the other.—*Rex v. Hartall*, 7 C. & P. 475.

INFANT.

- (*Necessaries—Evidence.*) Where the issue is, whether goods sold to an infant were necessaries, evidence is admissible to show that the infant, at the time of the sale, was already supplied with a sufficient quantity of that description of goods. (1 Esp. 211.)—*Burkhardt v. Angerstein*, 1 M. & Rob. 458.

INSOLVENT.

1. (*Construction of Insolvent Act—Fraudulent assignment.*) The 32d section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, does not apply only to such assignments and transfers as are made within three months before the commencement of the imprisonment, or during the continuance of such imprisonment, but extends to assignments made at any time, if made with the view or intention of petitioning the Court for the insolvent's discharge.—*Becke v. Smith*, 2 M. & W. 191.
2. (*Apparent ownership.*) The goods of a woman married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees, (although they were in his possession), if she was ignorant of the former marriage. But if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to his assignees.—*Miller v. Demetz*, 1 M. & Rob. 479.

INSURANCE.

1. (*Average.*) Insurance on a ship, V., with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage to the latter, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship V., on the settlement, had to pay a balance to the other ship: Held, not to be a loss to which the underwriters were liable: Held, also, that the expense of the provisions and wages of the crew of V., during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss. (1 Park. Ins. 89, 1 T. R. 132.)—*De Vaux v. Salvador*, 1 Ad. & E. 420.
2. (*Consolidation.*) Where 60 actions were pending on a policy on a ship which had been insured to a very large amount, and a consolidation rule had been entered into, in which the plaintiff and the other defendants agreed to be bound by the decision in the present action; the plaintiff having recovered a verdict, on which a rule nisi had been obtained for a new trial, the Court refused to order the defendant to pay the amount recovered against him into Court, or to invest it, such application being made on the ground that the great arrear of causes in the new trial paper would prevent the rule from coming on for argument for so long a time, as greatly to increase the plaintiff's losses and risk.—*Ohrly v. Dunbar*, 1 N. & P. 244.
3. (*Against fire—Alteration of risk—Misdescription.*) Insurance against fire on a granary, with a kiln for drying corn attached. One condition indorsed on the policy stated, that unless the trades carried on in the insured premises were accurately described, and if a kiln or any process of

fire heat were used and not noticed in the policy, the policy was to be void. Another condition stated, that if the risk to which the premises were exposed were by any means increased, notice was to be given to the office, and allowed by indorsement on the policy, or otherwise the insurance to be void. A cargo of bark having sunk near the premises of the plaintiff (the insurer), he allowed the bark to be dried at his kiln gratis, and in consequence of the fire at the kiln during this process, which lasted three days, the premises were burnt down. In an action against the insurers, the jury found that drying bark was a more dangerous process than drying corn: Held, first, that a user of the kiln for a different purpose than that intended at the time of the policy did not constitute a misdescription or omission within the first condition. Secondly, that a single user of the kiln as a bark kiln, gratis, was not such an alteration or increase of the risk as required notice. Thirdly, that the two conditions taken together did not amount to a warranty that the plaintiff would not use the kiln for any other purpose than drying corn. Fourthly, that though the fire is occasioned by the negligence of the assured, he, not being guilty of fraud, may recover.—*Shaw v. Robberds*, 1 N. & P. 279.

4. (*What facts material to be communicated to insurers.*) A policy of insurance on a ship called the King George, at and from Malaga to London, warranted to sail on the 10th October, was effected on the 3rd November following. The insurer communicated to the underwriters that the King George, and another vessel called the Fruiter, both sailed from Malaga on the 10th October, and the underwriters knew that the Fruiter had arrived at London some days before; but the insurer knew also that the captain of the Fruiter had seen the King George off Oporto on the 21st October, when they had parted company by reason of a gale coming on; and this fact he did not communicate to the underwriters. The King George was lost in a storm, at the entrance of the channel, on the 25th October. In an action on the policy, the jury having found for the plaintiff, and that the fact not communicated was not a material one, the Court granted a new trial. (1 B. & Ald. 672.)—*Westbury v. Aberdeen*, 2 M. & W. 267.
5. (*On life—Warranty against diseases, construction of.*) Where a policy of insurance on life contained a warranty that the assured "had not been afflicted with, nor was subject to, gout, vertigo, fits, &c.:" Held, that such warranty was not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy, it must be shown that his constitution either was naturally liable to fits, or by accident or otherwise had become so liable.—*Chattock v. Shawe*, 1 M. & Rob. 498.

INTERPLEADER ACT.

1. A sheriff having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared, and a rule was made that the parties should appear in the next term, and maintain or relinquish their claims, &c., and that in the meantime the sheriff should continue in possession till further order of the Court, and proceedings

against him be stayed; and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the claimant obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial was discharged. The interpleader rule had never been enlarged, or in any manner formally continued: Held, that the Court might nevertheless act upon it for the purpose of awarding to the successful party his costs of appearing to the sheriff's rule, and costs of keeping possession, if properly incurred.—*Levy v. Champneys*, 4 Ad. & E. 365.

2. When, upon a rule obtained under the Interpleader Act, the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequently to the seizure, the Court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an issue against the sheriff for misconduct, provided it should turn out he had been guilty of any; and also, if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him.—*Lewis v. Jones*, 2 M. & W. 203.
3. (*Costs.*) If an order for an issue is made at chambers by a single judge for the relief of the sheriff under the Interpleader Act, it is necessary for the successful party to come to the Court to obtain an order for his costs.—*Matthews v. Sims*, 5 D. P. C. 234.
4. Where a plaintiff in an issue directed under the Interpleader Act does not proceed to the trial of it, the Court will not permit another person's name to be substituted as plaintiff, without making the originally appointed plaintiff a party to the rule.—*Lydal v. Biddle*, 5 D. P. C. 244.
5. The Court has no power under the act to dispose summarily of the matter in dispute between the parties who appear on the sheriff's rule, without the consent of both the plaintiff and the claimant.—*Curlewis v. Pocock*, 5 D. P. C. 381.
6. (*Costs.*) On a sheriff's rule, he is not entitled to costs, although the execution creditor does not appear.—*Beswick v. Thomas*, 5 D. P. C. 458.

LANDLORD AND TENANT.

1. (*Determination of tenancy—Waiver—Evidence.*) To a declaration for rent of a coal-mine, the defendant pleaded a determination of the tenancy by notice to quit, and the plaintiff replied a waiver of such notice, which was denied: Held, that it was properly left to the jury to say whether a continuance to work the mine for a short time after the expiration of the notice, was intended by the defendants as a waiver of the notice. No continuance of the tenancy is necessarily implied from the mere fact of a tenant's continuing in possession after the expiration of a notice to quit given by him. (4 Campb. 275; 1 T. R. 159.)

A. and B., partners, carrying on business under the name of the L.

Coal Company, and being lessees of a coal mine, gave notice to quit, and after the expiration of such notice continued for a short time to work the mine. Afterwards A. and C. carried on the same general business under the same name, and without any public notification of the change in the firm. In an action against A. and B. for rent due subsequent to the expiration of the notice, a letter from the agent of A. and C., respecting the subsequent working, was held not admissible to show that A. and B. intended, in so doing, to waive the notice and continue the tenancy.—*Jones v. Sheares*, 6 N. & M. 428.

2. (*Creation of tenancy.*) In December, 1819, A.'s father was tenant of a farm of the plaintiff, till the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and read from a printed paper the terms of the letting. A. was present, and assented to these terms, agreeing to succeed his father at Lady-day; but no writing was signed. He did then enter, and continued tenant till his death; after which the defendants, his executors, occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, signed by the plaintiff's attorney, who was present at the letting, beginning—"A. B., as agent of the plaintiff, agrees to let, and C. D. agrees to take"—and going on to state the farm, the rent, and when payable, and that the term was for a year certain from Lady-day, and so from year to year until notice to quit given: Held, that the agreement, followed by entry and payment of rent, created a tenancy on the terms contained in the printed paper and memorandum; and that the attorney (the witness) might refer to them to show what were the terms of the demise.—*Lord Bolton v. Tomlin*, 1 N. & P. 247.

3. (*Fraudulent removal—Evidence.*) In trespass for breaking and entering the plaintiff's house and taking his goods, the defendant pleaded, first, not guilty; secondly, that the goods were not the plaintiff's; thirdly, as to the breaking, that R. was in arrear to W. for rent, and had fraudulently removed his goods to the plaintiff's house, and that the defendants, as servants of W., distrained the goods. At the trial the plaintiff proved the trespass, and the defendant went into evidence of the fraudulent removal: Held, that the plaintiff might, in reply, go into evidence to show that W. had parted with his estate before the removal of the goods.

A landlord has no right to follow the goods of a tenant, who has conveyed them away after the tenancy has expired, by reason of the landlord having conveyed away his reversion.

The answer of A. and B. to a bill in equity, filed by a third party, stating that A. has conveyed a reversion to B., is evidence against B. that he has done so; and if the answer refers to a deed, that does not make it necessary to give a notice to produce the deed.—*Ashmore v. Hardy*, 7 C. & P. 501.

LAND TAX.

The King's dock yards are not assessable to the land tax.—*Attorney General v. Hill*, 2 M. & W. 159.

LARCENY.

1. Indictment for stealing two horses in Kent; the only evidence of stealing in Kent was, that the constable having taken the prisoner in Surrey, and the prisoner having offered on some pretence to go to a place in Kent, the constable and the prisoner rode the horses there, and the prisoner escaped, leaving the horses with the constable: Held, not sufficient.—*Rex v. Symmonds*, Moo. C. C. R. 408.
2. Indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants, in the same house.—*Rex v. Finch*, Moo. C. C. R. 418.
3. It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners.—*Rex v. Webb*, Moo. C. C. R. 431.
4. The prisoner, occasionally employed as a clerk to the prosecutors, having received from them a cheque on their bankers, payable to a creditor, for the purpose of giving it to the creditor, appropriated it to his own use: Held a larceny of the cheque.—*Rex v. Metcalf*, Moo. C. C. R. 433.
5. The prisoner had received the prosecutor's horse to be agisted, and after a short time sold it: Held, not larceny.—*Rex v. Smith*, Moo. C. C. R. 473.
6. (*Property in the goods.*) A.'s wife was employed by her father to sell sheep, and receive the amount at R.; she did so, but before she left R., a note which she had received in payment was stolen from her: Held, properly described as the property of her husband.—*Rex v. Roberts*, 7 C. & P. 485.

LEASE.

(*Whether instrument is a lease or agreement for a lease.*) An instrument will operate as a lease, or as an agreement for a lease, according to the intention to be collected from the whole instrument. And where, notwithstanding the instrument gave the tenant immediate right of possession, &c., it contained a proviso declaring that the instrument was not to operate further than as an agreement for a lease, it was held that it could only be treated as such.—*Perring v. Brook*, 1 M. & Rob. 510.

LEVARI FACIAS. See PRACTICE, 36.

LIBEL.

1. (*Declaration—Striking out superfluous averments, &c.*) Superfluous averments and innuendos in libel ought not to be struck out at the instance of the plaintiff, at nisi prius.—*Prudhomme v. Fraser*, 1 Moo. & Rob. 435.
2. (*Evidence of previous counter-libels.*) In libel, previous libels of the plaintiff, shown to be the provocation of that charged, are admissible in mitigation of damages. (3 B. & C. 113.)—*Watts v. Fraser*, 1 M. & Rob. 449; *Moore v. Oastler*, ib. 451, n.
3. (*Privileged communication.*) Charges made by a rate-payer against the constable of a district, to a meeting of rate-payers met to investigate the

constable's disposal of the money of the inhabitants, are privileged, and may be made by letter, if the party be prevented from attending. The party alleging such letter to be libellous must prove the absence to have been wilful.—*Spencer v. Amerton*, 1 M. & Rob. 470.

LIMITATION ACT.

W. permitted J. to occupy land, of which he (W.) was seised in fee, for twenty years, up to J.'s death in 1831; W. died in September, 1833; and the defendant, who was the son and heir-at-law of J., occupied until 1836. On ejectment brought by the devisees of W., the jury found that the possession of J. was not adverse to W.: Held, that the right of action was not barred by the 3 & 4 Will. 4, c. 27, ss. 2 & 7, but was saved by s. 15 of that act, the action being brought within five years from the passing of the act.—*Doe d. Burgess v. Thompson*, 1 N. & P. 215.

LIMITATIONS, STATUTE OF.

The fact of its appearing by the plaintiff's particulars that the debt is barred by the statute of limitations, is no ground for discharging a defendant out of custody on *mesne process*.—*Merceron v. Merceron*, 5 D. P. C. 271.

And see **STAMP**, 1.

LONDON DOCK ACT.

(*Compensation under*.) Under the London Dock Act, persons having an estate or interest not less than from year to year in houses, &c., who should be injured in such estate or interest by any of the works authorized by the act, were to be compensated by the dock company: Held, that the company were not liable for compensation to the owner of a house occupied as a tavern, the pecuniary value of which was lessened by reason of a destruction of the neighbourhood by the works, duly authorized, of the company, where the house, though less valuable as a tavern or shop, was not rendered less valuable as a private residence. (2 Bing. N. C. 281; 9 B. & C. 879.) —*Rex v. London Dock Company*, 6 N. & M. 390.

MALICIOUS ARREST.

(*Of attorney*.) If A. wilfully and maliciously cause B., an attorney, to be arrested on *mesne process*, knowing him to be an attorney, an action on the case lies against A. for causing such arrest; and the fact of A. having a good cause of action against B. for a large sum, will be no defence.

In an action for a malicious arrest, the question is, whether the original plaintiff had a probable cause of action for the amount for which he arrested, not whether he had a probable cause of action in the particular form of action brought. Thus, where C. had a good cause of action on a covenant for a sum of 1150*l.* against A. and B., separately but not jointly, and he sued A. and B. jointly, and arrested B. for that amount; it was held that B. could not sue him for a malicious arrest.

An averment in the declaration that the plaintiff was *arrested*, is satisfied by proof of a *detainer*.—*Whalley v. Pepper*, 7 C. & P. 506.

MALICIOUS TRESPASS ACT.

Goods remain in "a stage, process, or progress of manufacture," within the

meaning of the 7 & 8 G. 4, c. 30, s. 3, though the texture be complete, if they be not yet brought into a condition fit for sale.—*Rex v. Woodhead*, 1 M. & Rob. 549.

MANDAMUS.

(*To steward of manor to enrol deed of disposition.*) In applying for a mandamus to the steward of a manor to enrol a deed of disposition, pursuant to 3 & 4 W. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit.—*Crosby v. Fortescue*, 5 D. P. C. 273.

And see MUNICIPAL CORPORATION ACT; PATENT; PENSION.

MANOR. See BRIDGE.

MASTER AND SERVANT.

In an action for damage done through negligent driving of a carriage and horses let to hire, and driven by the servants of the owner, Lord Abinger, C. B. held that it was a question for the jury whether the servants were acting as the servants of the party hiring, or of the owner; expressing his opinion that the Court of K. B. had pursued an erroneous course when they allowed the question to be discussed as matter of law, in the case of *Laugher v. Pointer*, 5 B. & C. 547.—*Brady v. Giles*, 1 M. & Rob. 494.

MINES.

(*Action for use and occupation of minerals.*) An action for use and occupation lies, under 11 G. 2, c. 19, upon a parol demise of the minerals lying in the lands of the lessor, coupled with actual entry. (2 B. & Ald. 724, Co. Litt. 6 a.)—*Jones v. Reynolds*, 6 N. & M. 441.

MISDEMEANOR.

(*Right of traverse in.*) A party acquitted of a felony, for which he has been committed or held to bail more than 20 days, is entitled to traverse, on an indictment being preferred against him for the same transaction as a misdemeanor. (3 C. & P. 222.)—*Rex v. Williams*, 1 M. & Rob. 503.

MONEY HAD AND RECEIVED.

(*To receive money paid under protest.*) A certificated bankrupt, being arrested on a *ca. sa.* for a debt proveable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money paid back: Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money.—*Payne v. Chapman*, 4 Ad. & E. 365.

And see TROVER, 2.

MORTGAGOR AND MORTGAGEE.

(*Estoppel on mortgagor.*) A., seised in fee of an undivided moiety of lands, and holding the other moiety as tenant to B., mortgages the entirety to C. Subsequently B. recovers his moiety in ejectment against A., and afterwards grants A. a lease for 14 years. In ejectment by C. against A., A. is estopped from setting up the lease from B.—*Doe d. Old v. Vickers*, 6 N. & M. 437.

MUNICIPAL CORPORATION ACT.

(*Revision of burgess lists—Mandamus.*) Where the names of certain burgesses, duly qualified in all other respects, were objected to and expunged from the burgess lists by the mayor and assessors on revision, on account of the non-payment of the shilling required by the 2 W. 4, c. 45, s. 56, the Court of K. B. considered that they had no power to grant a mandamus to insert the names.—*Rex v. Mayor of Hythe*, 1 N. & P. 239.

And see BRIBERY.

MURDER.

1. (*Indictment—Name by reputation.*) Indictment for murder of a female bastard child, whose name was to the jurors unknown. The child had not been baptized, but the prisoner (the mother), had said she should like it to be called Mary Ann, and at another time Little Mary. The father was a Baptist: Held, that the child had not acquired a name by reputation, and that the indictment was good.—*Rex v. Smith*, Moo. C. C. R. 402.
2. (*Same.*) An illegitimate child three weeks old, which had been baptized by the name of Eliza, without any surname, was described in the indictment as Eliza Waters, Waters being her mother's name: Held a misdescription, the child not having acquired such name by reputation.—*Rex v. Waters*, Moo. C. C. R. 457.

And see INDICTMENT, 1.

ORDER OF JUSTICES.

(*Notice of appeal against.*) Where notice of appeal against an order of two justices is required to be given to such justices, service of notice on one only is sufficient.—*Rex v. Justices of Staffordshire*, 6 N. & M. 477.

ORDER OF REMOVAL.

1. (*What residence makes a party removable.*) A poor person legally settled in parish A., who having come into parish B. *animo morandi*, there meets with an accident, such as to make it dangerous actually to remove him, or to take him before a magistrate for examination as to his settlement, and in consequence becomes chargeable, cannot be regarded as *casual poor*; and an order for his removal may be made and suspended under the 35 G. 3, c. 101, ss. 1 & 2: and being so made and suspended, parish A. is bound to pay to the officers of parish B. expenses incurred by them in curing and maintaining the pauper during the suspension of the order of removal. (10 East, 25.)—*Rex v. Inhabitants of Oldland*, 6 N. & M. 529.
2. (*Appeal—Stamping assignment of indenture of apprenticeship.*) Pending an appeal at sessions against an order of removal on a settlement by service under an unstamped agreement indorsed on an indenture of apprenticeship, the overseers of the respondent township applied for a mandamus to the overseers of the appellant township to produce the assignment to be stamped. The Court refused the writ.—*Rex v. Overseers of Westowe*, 1 N. & P. 223.

OVERSEER.

(*Liability of, for supply of goods to poor.*) A parish officer who supplies

goods for his own profit to an individual pauper, is not liable to the penalty imposed by the 55 Geo. 3, c. 137, s. 6.

Quare, whether that clause is impliedly repealed by the 4 & 5 Will. 4, c. 76, s. 77. (3 B. & Ald. 145; 8 Taunt. 239; 1 D. & R. 397; 1 Ad. & Ell. 514.)—*Henderson v. Sherborne*, 2 M. & W. 236.

PARENT AND CHILD.

(*Liability of father for necessities supplied to child.*) Where a child was delivered by its father to B., the wife of A., on an undertaking that the father should not be called upon for its maintenance, and the child remained with B. many years, both before and after the death of A.: Held, that no action could be maintained by B. against the father for necessities supplied by her to the child, although the child had at different times, without the father's knowledge, been taken out of and returned to the custody of B. by its mother, who had eloped from the father, and was living with an adulterer.

Quare, whether at common law a father is bound to provide his legitimate children with the necessities of life, so as to give a right of action against him to a stranger, who supplies the child with necessities on the father's refusal to do so. (3 Esp. 250; 1 C. & P. 15; 1 Bl. Comm. 447; 2 Ld. Raym. 699.)—*Urmston v. Newcomen*, 6 N. & M. 454.

PARISH CLERK. See SETTLEMENT, 1.

PARTICULARS OF DEMAND.

1. (*How far they limit defendant in evidence—Payment into Court.*) If to a declaration in the ordinary form, in indebitatus assumpsit, with particulars containing various causes of action, the defendant pleads payment into Court, he is not precluded by that plea from contesting his liability in respect of any items beyond the amount paid into Court; as the particulars are not to be considered as part of the declaration. (4 B. & Ad. 673.)—*Booth v. Howard*, 5 D. P. C. 439.
2. The particulars were for goods sold on the 6th January; the evidence was of goods sold on the 28th May. The Court refused to set aside a verdict for the plaintiff, all other accounts between the parties having been settled.—*Flemming v. Crisp*, 5 D. P. C. 454.

PARTNERSHIP.

Where two persons are in partnership, the presumption, in the absence of evidence to the contrary, is, that they are interested in the partnership stock in equal moieties.—*Ferrar v. Beswick*, 1 M. & Rob. 527.

PATENT.

(*Mandamus to enforce rights of patentee.*) In a patent for an invention, it was stipulated that the patentee should supply for his majesty's service so much of the invented article as should be required, at such reasonable prices and terms as should be settled for that purpose by the Admiralty. The patentee allowed the article to be made at the royal dock-yards, and at the request of the Navy Board, gave instructions for the guidance of the smiths there, without stipulating for any recompense for the use of the

patent : Held, that a mandamus would not lie to the Admiralty to fix a price to be paid to the patentee.—*Exp. Pering*, 6 N. & M. 472.
And see WITNESS, 3.

PAYMENT. See CHEQUE.

PAYMENT INTO COURT. See PARTICULARS OF DEMAND, 1; PRACTICE, 25.

PENSION.

1. (*Under 3 G. 4, c. 113, mandamus to enforce payment of.*) The Lords of the Treasury may at any time, at its discretion, revoke the grant of a superannuation allowance under the above act, and such discretion cannot be questioned in a Court of Law. No mandamus lies, therefore, to compel them to submit a vote to parliament for such allowance, or to issue a minute for its payment.

And they have no power, under 50 G. 3, c. 117, and 3 G. 4, c. 113, to grant pensions for life to superannuated and retired officers in the public service. (5 N. & M. 589.)—*Rex v. Lords of the Treasury*, 6 N. & M. 505, 508.

2. A naval officer on half pay has no such legal right to the half pay that a mandamus can issue to the Lords of the Admiralty, requiring them to pay to his executor arrears of half pay which accrued during his life-time.—*Exp. Ricketts*, 6 N. & M. 523.

PERJURY.

(*Indictment—Assignment of perjury in affidavit.*) An indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment signed since the rules of H. T. 4 W. 4, alleged that the judgment was entered up "in or as of" Trinity Term, 5 W. 4: Held bad; and the judge refused to amend it under the 9 G. 4, c. 15.—*Rex v. Cooke*, 7 C. & P. 559.

PLEADING.

1. (*Issue informally joined, when to be taken advantage of.*) To an action of trespass for false imprisonment, the defendant pleaded leave and license; to which plaintiff replied *de injuriâ*, concluding to the country, without an "&c."; and no issue was joined on this. There were also pleas of justification, which were replied to, and issues joined on the replications:—Held, that the defendant could not take advantage of the above informality, after trial and verdict for the plaintiff. (2 Wms. Saund. 319, a, note 6.)—*Stockdale v. Chapman*, 4 Ad. & E. 419.

2. (*Several pleas.*) In trespass *qu. cl. fr.*, two pleas, the one justifying under a custom for tanners to make trenches in lands for conveying water for the better working of a stannary, and the other alleging the custom to be upon making compensation for the injury done, were held not to be pleadable together, within the new rules. (1 M. & W. 16.)—*Bastard v. Smith*, 1 N. & P. 242.

3. (*Joinder of counts in assumpsit.*) A count for work done by the plaintiff as administrator, may be joined with counts for goods sold and work done by the intestate, on promises to him.—*Edwards v. Grace*, 2 M. & W. 190; 5 D. P. C. 302.
4. (*Marginal note to demurrer.*) If a *special* demurrer be delivered without a marginal note of the matter intended to be argued, the Court will set it aside. But it is sufficient if it state that the points intended to be argued are those stated in the demurrer itself.—*Lindus v. Pound*, 2 M. & W. 240; 5 D. P. C. 459; and see *Berridge v. Priestley*, 5 D. P. C. 306.
5. (*Rule to strike out counts, form of.*) A rule to strike out any of the counts of a declaration must be drawn up on reading the declaration, or on an affidavit stating the nature and effect of the different counts.—*Roy v. Bristowe*, 2 M. & W. 241; 5 D. P. C. 452.
6. (*What plea amounts to general issue.*) A special plea to an action on an attorney's bill, which sets up as a defence that the plaintiff conducted the business so negligently and unskilfully as to be useless to the defendant, —or, that it was done under an indemnity from the plaintiff against costs and expenses,—is bad on special demurrer, as amounting to the general issue.—*Hill v. Allen*, 2 M. & W. 283; 5 D. P. C. 470.
7. On a plea that the defendant did not *make* the promissory note mentioned in the declaration, the defendant cannot give in evidence that he was of imbecile mind at the time when he made it.—*Harrison v. Richardson*, 1 M. & Rob. 504.
8. *Quare*, whether, in an action of *debt*, where the defendant pleads payment, and does not appear to support his plea, the plaintiff is bound to prove the amount of his debt, or is entitled, without proof, to a verdict for the amount claimed in the particulars.—*Macintosh v. Weiller*, 1 M. & Rob. 506.
9. (*Effect of not guilty, in action on warranty.*) The plea of not guilty, to an action on the case for a deceitful warranty of soundness, put in issue both the warranty and the unsoundness.—*Spencer v. Dawson*, 1 M. & Rob. 553.
10. (*Plea puis darrein continuance, when receivable.*) The judge at nisi prius is bound to receive a plea *puis darrein continuance*, good in form, and verified by affidavit, there being also an affidavit under the rule of Hil. T. 4 W. 4, s. 2, though there may be reason to believe that it is pleaded for delay.—*Corporation of Ludlow v. Tyler*, 7 C. & P. 537:
11. (*Several pleas.*) Where a plaintiff has consented to a rule to plead several matters, the Court will not entertain an application to set aside any of those pleas.—*Houen v. Carr*, 5 D. P. C. 305.
12. (*Averment of promise in assumpsit on bill or note—Demurrer, when too large.*) The rule of Trin. T. 4 W. 4, as to the averment of the promise where there is a count against the maker of note or acceptor of a bill, and also the common counts, applies only to the latter.

Where a demurrer to a declaration is too large, the Court will give judgment for the plaintiff. In such case, the plaintiff should enter a *nolle prosequi* as to the counts which are bad, or the defendant may bring a writ of error.—*Wainwright v. Johnson*, 5 D. P. C. 317.

13. In an action by indorsee against indorser of a bill of exchange, a plea that the defendant did not *draw* the bill, is not a *nullity*, so as to entitle the plaintiff to sign judgment.—*Allen v. Walker*, 5 D. P. C. 460.

And see **LIBEL, TENDER.**

PLEADING, IN CRIMINAL CASES.

1. (*Plea of autrefois acquit.*) Plea by one prisoner, indicted singly for receiving stolen goods, *autrefois acquit* under an indictment against him and four others, on which one was convicted, and the prisoner and the three others were convicted, held good.

Semble, an indictment stated to have been found on the oath or affirmation of A. B., &c. then and there sworn or charged as jurors, &c. without saying who were sworn and who affirmed, and that the latter were entitled to serve on their affirmation, is bad.—*Rex v. Damm*, Moo. C. C. R. 424.

2. (*Same.*) An acquittal on an indictment for having been present aiding and abetting in a felony, is no bar to an indictment charging the party as accessory before the fact.—*Rex v. Birchenough*, Moo. C. C. R. 477; 7 C. & P. 575.

POOR LAWS' AMENDMENT ACT.

(*Authority of Poor Law Commissioners—Election of Guardians.*) The Poor Law Commissioners have no power, under the 4 & 5 W. 4, c. 76, s. 39, to make an order for the election of a Board of Guardians in a parish where the administration of the poor laws is already in the hands of a Board of Directors under a local act. (*Williams, J., dissentiente.*)—*Rex v. Poor Law Commissioners*, 1 N. & P. 372. [See *antè.*]

POOR RATE.

1. (*Rateability to—Occupation.*) Where premises in the parish of A. are taken by the overseers of B., and used by them in the employment of the poor of B., such overseers are rateable to the relief of the poor of A. The unprofitableness of an occupation of premises does not exempt them from rateability to the relief of the poor. (5 T. R. 587; 3 East, 506.)—*Governors of the Poor of Bristol v. Wait*, 6 N. & M. 383.)
2. By a local act, the rector, churchwardens, &c. of a parish were authorized to make three distinct rates on all persons who should inhabit, hold, occupy, possess, or *enjoy* any land, house, shop, warehouse, or other building, tenement, or *hereditament*; viz. one rate for the relief of the poor and for the repair of the church, and another for cleansing, lighting, and repairing the streets, &c. of the parish; such last-mentioned rate to be a pound rate on the annual rent or value of all messuages, lands, tenements, and *hereditaments*, as should be held or occupied within the parish: Held, that the word "*hereditament*" meant such *hereditaments* only as

were the subject of actual corporeal occupation, and therefore that no incorporeal hereditament was thereby made rateable.—*Colebrooke v. Tickell*, 6 N. & M. 483.

POWER.

(*Of appointment, execution of.*) By deed between coparceners and their husbands, to lead the uses of a fine, in order to effect a partition, the share of one coparcener was limited (after life estates to the parents) "to the use of the child or children (without words of inheritance) for ever, subject nevertheless to such divisions, directions, orders, and appointments as the husband by will or deed should think fit to direct or appoint." Held, that these words gave the husband a power to appoint the fee-simple to any one child exclusively, and that such power was well executed by indentures of lease and release, expressed to be made in consideration of money as well as of natural affection. (1 Mod. 189; Carth. 232; 1 P. Wms. 149; 6 Ves. 193.)—*Doe d. Chadwick v. Johnson*, 1 M. & Rob. 553.

PRACTICE.

1. (*Staying proceedings—Effect of withdrawal of juror.*) On a trial in the Exchequer, a juror was withdrawn by consent. The plaintiff afterwards sued the defendant in K. B. for the same cause of action. The Court stayed the proceedings as being contrary to good faith; although the plaintiff, who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a fresh action.—*Moscatti v. Lawson*, 4 Ad. & Ell. 331.
2. (*As to re-opening rule.*) Where a party, arrested for the amount of a bill of costs, was discharged out of custody for an irregularity in the arrest, on the terms of undertaking to bring no action for the arrest, the circumstance of the bill's being afterwards reduced by taxation to an amount greatly below the sum for which the arrest was made, was held no ground for re-opening the rule to relieve him from such undertaking.—*Shirreff v. Gresley*, 4 Ad. & Ell. ; 6 N. & M. 446.
3. (*Same.*) Where a rule nisi for a prohibition to an inferior Court had been discharged, the Court of K. B. refused to allow the motion to be renewed, on affidavits stating matter not before presented to the Court, but which existed at the time of the former application. (5 N. & M. 415.)—*Bodenham v. Ricketts*, 6 N. & M. 537.
4. (*Distringas to outlawry.*) A distringas, for the purpose of proceeding to outlawry, may issue after a writ of summons which has been continued by *alias* and *pluries*, sued out to save the Statute of Limitations.—*Reay v. Youde*, 2 M. & W. 188; S. C. nomine *Ray v. Dow*, 5 D. P. C. 310.
5. (*Altering entry of verdict.*) In an undefended action on a mortgage deed, the plaintiff's counsel inadvertently took a verdict for the principal money only, omitting to include the interest. The Court refused to increase the verdict.—*Baker v. Brown*, 2 M. & W. 199; 5 D. P. C. 313; and see *Hilton v. Fowler*, 5 D. P. C. 312.
6. (*Countermand of notice of trial—Re-sealing record.*) Where notice of

trial has been given, and is afterwards countermanded, it is not necessary to reseal the record, unless the alteration is made to a day after the return of the writ.—*Chandler v. Bezward*, 2 M. & W. 205; 5 D. P. C. 311.

7. (*Judgment for want of plea.*) A declaration was delivered on the 9th January, indorsed to plead in four days, and on the same day the plaintiff demanded a plea. The plaintiff having signed judgment for want of a plea, at one o'clock on the 14th: Held, that the judgment was regular. (Over-ruling *Kemp v. Fyson*, 3 D. P. C. 265.)—*Blundell v. Hanson*, 2 M. & W. 243; 5 D. P. C. 457.
8. (*Rule for setting aside issue, form of.*) Where a rule for setting aside the issue and notice of trial, on the ground that the former was delivered as for trial at the sittings, and the latter before the Secondary, was drawn up on reading the judge's order for trial before the Secondary, the Court took judicial notice that it was an order in the cause, though that was not stated in the affidavits.—*Attwill v. Baker*, 2 M. & W. 272; 5 D. P. C. 462.
9. (*Judgment for want of plea.*) The defendants, after obtaining a week's time to plead, took out several summonses, on successive days, for further time, the last being returnable on the day after the week's time expired; but took no order on either of them. On that same day the plaintiff signed judgment: Held regular.—*Bass v. Cooper*, 2 M. & W. 310.
10. (*Right to begin.*) In covenant, the party on whom the affirmative of the issue lies is entitled to begin, though the damages are unascertained.—*Reeve v. Underhill*, 1 M. & Rob. 440; *Wootton v. Barton*, ib. 518.
11. (*Same.*) In assumpsit for unworkmanlike execution of a contract; plea, that the work was properly done, the plaintiff is entitled to begin.—*Amos v. Hughes*, 1 M. & Rob. 464.
12. (*Same.*) Where the plaintiff in ejectment claims as heir at law, and the defendant as devisee, if the heirship be admitted, the defendant is entitled to begin, though the plaintiff professes to set up an outstanding term as to part of the property.—*Doe d. Smith v. Smart*, 1 M. & Rob. 476.
13. (*Same.*) In replevin, any issue in which the affirmative is on the plaintiff, gives him the right to begin.—*James v. Salter*, 1 M. & Rob. 501.
14. (*Same.*) Breach of promise of marriage. Plea, that the plaintiff, after the promise, conducted herself in a lewd, unchaste, and immodest manner: Held, that the plaintiff was entitled to begin.—*Harrison v. Gould*, 7 C. & P. 580.
15. (*Same.*) In considering which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out.

In covenant for not repairing, the defendant pleaded that he did repair, and did not suffer the premises to become ruinous, &c., as in the declara-

tion mentioned: Held, that the plaintiff must begin.—*Soward v. Leggatt*, 7 C. & P. 613.

16. (*At nisi prius, where party conducts his own case.*) When a party conducts his own case, and examines his own witnesses, counsel are not allowed to argue points of law for him.—*Moscatti v. Lawson*, 1 M. & Rob. 454.
17. (*Adding similiter.*) When a record is taken down to trial without any issue having been joined by the addition of the similiter, the defect may be cured by adding the similiter at the trial. If the jury have been sworn before the defect is discovered, they should be re-sworn after the similiter has been added.—*Dyson v. Warris*, 1 M. & Rob. 474.
18. (*Impounding documents at nisi prius.*) A judge will not order documents which have been given in evidence to be impounded, unless application is made for the purpose during the trial of the cause.—*Boston v. Ockford*, 7 C. & P. 547.
19. (*Defences by separate counsel.*) Where the defendants pleaded a joint plea of not guilty, the judge refused to allow the counsel of each defendant to cross-examine or address the jury separately.—*Seale v. Evans*, 7 C. & P. 593.
20. (*Sending witnesses out of Court.*) Either party, at any period of a cause, has a right to require that the unexamined witnesses shall be sent out of Court.—*Southey v. Nash*, 7 C. & P. 632.
21. (*Form of issue.*) The omission to transcribe into the issue delivered the dates of the pleadings, constitutes a variance of which the defendant is entitled to avail himself after trial, and after the roll is made up, although the dates appear on the roll.—*Worthington v. Wigley*, 5 D. P. C. 209.
22. (*Amendment of order of nisi prius.*) The Court in banc has no jurisdiction to amend an order of nisi prius, until it has been made a rule of Court.—*Cranch v. Tregoning*, 5 D. P. C. 230.
23. (*Summons for time to plead—Stay of proceedings.*) A summons for time to plead, returnable at ten o'clock in the morning in term time, at chambers, operates as a stay of proceedings; although it is well known that a judge does not attend at chambers at that hour.—*Byles v. Walter*, 5 D. P. C. 232.
24. (*Judgment as in case of nonsuit.*) If a plaintiff gives notice of trial for a sittings earlier than is necessary by the practice of the Court, and he afterwards gives another notice of trial for a later sittings, but which is still within due time, the defendant is not entitled to judgment as in case of a nonsuit, although he has not proceeded to trial under his first notice, nor countermanded it. (2 W. Bl. 1298.)—*Ranger v. Bligh*, 5 D. P. C. 235.
25. (*Judgment as in case of nonsuit—Payment of money into Court.*) Where money had been paid into Court in satisfaction of the cause of action, and there was a replication of damages ultra, and the plaintiff had not proceeded to trial pursuant to a peremptory undertaking, the Court, on a motion for judgment as in case of a nonsuit, (an excuse being shown

for the default) discharged the rule on the plaintiff's undertaking to amend his replication, by accepting the money paid into Court, and paying the defendant the costs subsequent to the payment into Court.—*Kelly v. Flint*, 5 D. P. C. 293.

26. (*Service of rule.*) Service of a rule to compute "on the landlady of the house at which the defendant lodges," is insufficient. So also "on a workman on the defendant's premises."—*Salsbury v. Sweetheart*, 5 D. P. C. 243; *Hitchcock v. Smith*, *ib.* 248.
27. (*Notice of trial.*) A notice of trial in due time, according to the practice of the Court, is regular, although a previous notice has been given, which is void, and has not been countermanded.—*Fell v. Tyne*, 5 D. P. C. 246.
28. (*Service of rule to change the venue.*) It is regular to serve a rule to change the venue and deliver a plea at the same time, notwithstanding the new rules of pleading; although the issue which must be joined between the parties will prevent the plaintiff from giving an undertaking to give material evidence in the original county, or from fulfilling it.—*Phillips v. Chapman*, 5 D. P. C. 250.
29. (*Distringas.*) To obtain a distringas, it is absolutely necessary that the hour should be mentioned at the time of making the appointment.—*Atkinson v. Clean*, 5 D. P. C. 252.
30. (*Service of rule.*) Service of a rule to compute on a female servant of the defendant at his residence, held sufficient.—*Thomas v. Lord Ranelagh*, 5 D. P. C. 258.
31. (*Delivery of declaration—Irregularity—Waiver.*) Where the declaration is delivered on the day after that on which it bears date, it is merely an irregularity, which was held to be waived by delaying to come to the Court from the 26th October to the 9th November. (2 D. P. C. 218; 4 D. P. C. 293.)—*Newnham v. Hanny*, 5 D. P. C. 259.
32. (*Judgment for want of plea.*) Where a plaintiff had signed an interlocutory judgment for want of a plea too soon, and given notice of his intention to abandon it, but does not actually strike it out, the defendant need not come to the Court to set it aside. The Court, however, discharged a rule obtained for that purpose without costs.—*Robinson v. Stoddart*, 5 D. P. C. 266.
33. (*Rule for stay of proceedings, what is in violation of.*) The enlargement of one rule in a cause is a violation of a subsequent rule in the same cause, which is drawn up with a stay of proceedings.—*Wyatt v. Prebble*, 5 D. P. C. 268.
34. (*Stay of proceedings.*) The Court will not, on an application to set aside a warrant of attorney, and the judgment and execution thereon, direct a stay of proceedings in an action against the sheriff for an alleged false return to the execution sought to be set aside.—*Cassell v. Lord Glengall*, 5 D. P. C. 269.
35. (*Service of rule.*) A rule to compute cannot be made absolute on an

affidavit that the rule nisi has been left at the lodgings of the defendant, where he was served with the writ, if it appears that he had left before the rule nisi was obtained: it must be shown that endeavours have been made to find the defendant without success; then the Court will grant a rule nisi that service of the rule, by leaving it at the defendant's last place of abode, and sticking up a copy at the office, may be deemed good service.—*Black v. Cloup*, 5 D. P. C. 270.

36. (*Change of attorney—Levari facias.*) It is a good objection to a rule requiring a bishop to make his return to a *levari facias*, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served upon the bishop.

A bishop cannot be required to make a return of what has been levied under a *levari facias* previous to his coming into office.—*Phillips v. Berkeley*, 5 D. P. C. 279.

37. (*Nolle prosequi.*) Trespass. Pleas, first, not guilty; second, a justification. Replication and new assignment. Demurrer to replication and new assignment. 15*l.* damages on the first issue, and nominal damages on the second. The plaintiff entered a *nolle prosequi* on the new assignment, and gave defendant judgment on the demurrer. The Court set aside the *nolle prosequi*.—*Strother v. Randerson*, 5 D. P. C. 280.

38. (*Notice of trial—Setting aside trial—Affidavit of merits.*) Where a cause was tried in the absence of the defendant's attorney before the time specified in the notice of trial, the Court set aside the verdict without an affidavit of merits.—*Hanslow v. Wilks*, 5 D. P. C. 295.

39. (*Judgment as in case of nonsuit.*) It is no answer to a rule for judgment as in case of a nonsuit, that the proceedings were commenced without the plaintiff's authority. (1 C. M. & R. 402.)—*Barker v. Wilkins*, 5 D. P. C. 305.

40. (*Arrest of judgment—Irregularity in service of second writ.*) Where judgment was arrested on account of a defect in the declaration, and the plaintiff's attorney, on the evening of the same day, served the defendant's attorney with a copy of a writ of summons for the same claim, the Court set aside such writ with costs, on payment of the money due within twenty-four hours.—*Hayter v. Moat*, 5 D. P. C. 329.

41. (*Amendment of rule.*) Where a defect in a rule is attributable to the officer of the Court, it may be amended without costs.—*Downing v. Jennings*, 5 D. P. C. 373.

42. (*Setting aside proceedings—Damages above those laid in declaration.*) The fact of the damages and costs together amounting to more than the sum laid in the declaration, is no ground for setting aside the *ca. sa.* in that action, or subsequent proceedings against the bail.—*Kempeneers v. Holding*, 5 D. P. C. 374.

43. (*Distringas—Service of summons.*) The Court will not permit a *distringas*, where the service of the writ of summons has been upon an agent of the defendant.—*Grindley v. Thorn*, 5 D. P. C. 383.

44. (*Judgment as in case of nonsuit.*) If a plaintiff has once taken down his cause to trial, although a new trial be granted, and he gives fresh notice, pursuant to which he does not proceed, the defendant cannot move for judgment as in case of a nonsuit.—*Hawley v. Sherly*, 5 D. P. C. 393.
45. (*Same—Judgment of non-pros.*) Where the plaintiff gave notice of trial, and the defendant afterwards signed judgment of non-pros for not entering the issue pursuant to a rule for that purpose, it was held a sufficient answer to a rule for judgment as in case of a nonsuit, that the time for proceeding to trial expired pending a rule for setting aside the non-pros.
Judgment of non-pros for not entering the issue pursuant to rule, is irregular after notice of trial.—*Howell v. Jacobs*, 5 D. P. C. 394.
46. (*Peremptory undertaking—Costs.*) Where a plaintiff made several defaults in fulfilling his undertaking to proceed to trial, the Court will make him pay the costs of the last application to enlarge his peremptory undertaking. (4 D. P. C. 564.)—*De Rutzen v. John*, 5 D. P. C. 400.
47. (*Judgment for want of a plea, when to besigned.*) A plaintiff is not entitled to sign judgment for want of a plea until the time for pleading has expired, although none but irregular pleas have been delivered. (2 D. P. C. 674; 3 D. P. C. 246, 535.)—*Smith v. Rathbone*, 5 D. P. C. 401.
48. (*Interlocutory judgment in debt.*) An interlocutory judgment may be signed in an action of debt.—*Mackenzie v. Gayford*, 5 D. P. C. 403.
49. (*Irregular appearance—Waiver.*) If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the Court, as soon as such steps are taken by the plaintiff as show his intention to proceed on the appearance.—*Strange v. Freeman*, 5 D. P. C. 407.
50. (*Judgment as in case of nonsuit.*) Where a plaintiff gave notice of trial for the third term after issue joined, and countermanded that notice: Held, that he was too early to move for judgment as in case of a nonsuit in that term. (2 D. P. C. 216.)—*Gripper v. Lord Templemore*, 5 D. P. C. 408.
51. (*Recognizance on removal of cause from inferior jurisdiction.*) Where it appears from the declaration in a cause instituted in an inferior jurisdiction, that the sum claimed is exactly £20, it is not necessary to enter into the recognizance required by the 19 Geo. 3, c. 70, s. 6, and the 7 & 8 Geo. 4, c. 71, s. 6, in order to remove the cause into a superior Court. (2 B. & C. 802.)—*Brady v. Veeres*, 5 D. P. C. 416.
52. (*Time for setting aside irregular judgment.*) If a plaintiff seeks to set aside an interlocutory judgment for irregularity, he must come to the Court within a reasonable time from his knowing that it is signed, and cannot wait until a rule to compute is served.—*Grant v. Flower*, 5 D. P. C. 419.
53. (*Certificate for speedy execution—New trial.*) Where the judge made an order for speedy execution, under 1 Will. 4, c. 7, s. 4, and the defendant at once paid over the sum in dispute, and afterwards made a motion for

a new trial, the Court refused to order the plaintiff to pay the money into Court during the pendency of that rule.—*Morton v. Burn*, 5 D. P. C. 421.

54. (*Summons for time to plead, when a stay of proceedings.*) *Semble*, a summons for time to plead, returnable at half-past ten a. m. during term, is a stay of proceedings.—*Bebb v. Wales*, 5 D. P. C. 451.

PRACTICE, IN CRIMINAL CASES.

1. (*Statement of prosecuting counsel.*) In opening the case for the prosecution in felony, the counsel ought to state declarations proposed to be proved as well as facts.—*Rex v. Orrell*, 1 M. & Rob. 468.
2. (*Taking depositions before magistrate.*) Though a magistrate may not in legal strictness be bound to take down more than is material to prove the felony, yet, since the passing of the act giving prisoners a right to a copy of the depositions against them, the magistrate ought to return all that was said by the witnesses with respect to the charge; since the object of the legislature was to enable prisoners to know what they have to answer on the trial. But it is no objection to the deposition that the witness adds to his evidence on the trial.—*Rex v. Grady*, 7 D. P. C. 650; *Rex v. Cooney*, *ib.* 667.

PRINCIPAL AND AGENT.

1. (*Liability of members of clubs.*) Where a club was formed, subject to the following among other rules, viz. that the entrance fee on admission should be ten guineas, and the annual subscription five guineas; that if the subscriptions were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them: Held, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; and that the committee had no authority to pledge the personal credit of the members.—*Fleming v. Hector*, 2 M. & W. 172.
2. In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, M.: Held, that the plaintiff was bound, in order to recover in the action, to prove that M. was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant, in so employing M., was not acting as agent for any other person; or else that M. was a principal jointly with the defendant, or with the defendant and others: and that it would make no difference that the plaintiff, at the time, considered M. as authorized to contract on behalf of the candidate, if in fact he was not so authorized.—*Thomas v. Edwards*, 2 M. & W. 215.

PRISONER.

1. (*Discharge of small debtor.*) A defendant is not entitled to his discharge

- under the 48 Geo. 3, c. 123, unless he has been confined for the twelve months *within the walls* of the prison. *Gilbert v. Pape*, 2 M. & W. 311; 5 D. P. C. 449; *Sumption v. Monzani*, *ib.* note.
2. (*Notice under 48 Geo. 3, c. 123.*) The notice under the 48 Geo. 3, c. 123, s. 1, must be served on the plaintiff himself personally; and he does not waive the objection that it has not been so served by appearing on the notice.—*Biddulph v. Gray*, 5 D. P. C. 406.
3. (*Render to county gaol, where cause removed from Palace Court.*) Where a cause has been removed from the Palace Court, the defendant's bail cannot render him to the county gaol under 11 Geo. 4 and 1 Will. 4, c. 70, s. 21, the Palace Court not being a superior Court of Record within the meaning of that act; and the plaintiff does not waive the objection by declaring against the defendant as in the custody of the marshal.—*Scaith v. Brown*, 5 D. P. C. 412.
4. Where a party is in the custody of the sheriff on a criminal charge, it is not necessary to obtain an order of the Court for the sheriff to detain him in a civil suit.—*Grainger v. Moore*, 5 D. P. C. 456.

And see BAIL, 2.

PROCESS.

1. (*Mistake in teste of writ.*) A mistake in the year in the teste of the copy of a writ of summons, the writ itself being right, is a mere irregularity, which is waived if the defendant does not apply to the Court before the time for entering an appearance has elapsed.—*Edwards v. Collins*, 5 D. P. C. 227.
2. (*Teste of sci. fa.*) A writ of sci. fa. cannot be tested in vacation, notwithstanding the provisions of sect. 12 of the Uniformity of Process Act.—*Seaton v. Heap*, 5 D. P. C. 247.
3. (*Service of writ in wrong name.*) Where a writ of summons issued against Thomas G., and was served on William G., the Court refused to set aside the proceedings.—*Griffin v. Gray*, 5 D. P. C. 331.
4. (*Form of return of non est inventus.*) A return to a capias that "the defendant is not to be found in my bailiwick," is bad.—*Rex v. Sheriff of Kent* in *Potter v. Simpson*, 5 D. P. C. 451.

QUO WARRANTO.

To entitle a party to an information in the nature of a *quo warranto*, on the ground that the party filling the office has not been elected by a majority of the class entitled to vote, the relator must show who the class are that are entitled to vote, and that another person had a majority of such votes.

The word "inhabitant" has no definite legal meaning, but is to be construed according to the subject-matter with which it is connected. And a relator in *quo warranto* is bound, in order to make out a *prima facie* case, to show what is its proper construction.—*Rex v. Mashiter*, 1 N. & P. 314.

RAPE.

(*By infant under fourteen.*) The presumption that an infant under fourteen cannot commit a rape, is not affected by the statute 9 G. 4, c. 31, s. 16, 17.—*Rex v. Groombridge*, 7 C. & P. 583.

RESTRAINT OF TRADE.

The plaintiff, by deed, sold to the defendants his trade and business as a carrier between London and Wisbech, and, in consideration of the covenants therein contained on the defendants' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except as hereinafter mentioned; and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier: and the defendants, in consideration of the before-mentioned covenants, and of the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant: Held, that the plaintiff's covenant to serve during his life was good in law, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants. (1 P. Wms. 181; 2 Stra. 739; 3 Bingh. 122; 7 Bingh. 735; 1 C. & J. 331.)

Quere, whether, supposing this covenant were void, as being in general restraint of trade, the plaintiff could nevertheless have sued on the defendants' covenant to pay. (2 Saund. 155 a.)—*Wallis v. Day*, 2 M. & W. 278.

SESSIONS.

(*Mandamus to hear appeal.*) When the sessions dismiss an appeal, subject to a case, the Court of King's Bench will not grant a mandamus to enter continuances and hear the appeal. (1 Ad. & E. 606.)—*Rex v. Justices of Suffolk*, 1 N. & P. 306.

SET-OFF.

1. (*Form of particulars of.*) It is no objection to the use of particulars of set-off, that they are headed in a different Court from that in which the action is brought, if they are not delivered pursuant to an order of the latter Court.—*Lewis v. Hilton*, 5 D. P. C. 267.
2. (*Particulars of.*) A defendant who has not complied with a judge's order to deliver particulars of set-off, "with dates," will not be allowed to give any evidence of his set-off. And particulars delivered, in which the only dates were, "from January, 1828, to January, 1834," are not a compliance with such order.—*Swain v. Roberts*, 1 M. & Rob. 452.

And see EXECUTOR AND ADMINISTRATOR.

SETTLEMENT.

1. (*By office—Parish Clerk.*) A pauper was appointed parish clerk by the rector of the parish, in the following manner: the rector sent for him on a Sunday, and requested him to perform the duty on that day, and on coming

out of the desk said to the pauper :—"I shall appoint you my regular clerk and sexton, and to follow me in funerals and marriages." Held, a good appointment of the pauper as parish clerk, and that he gained a settlement by serving the office. (2 Salk. 536.)—*Rex v. Inhabitants of Bobbing*, 1 N. & P. 164.

2. (*By apprenticeship—Service with second master.*) If service by an apprentice with a second master can in other respects be construed to be a good service under the indenture with the first master, it is immaterial whether the second master knew the fact of the apprenticeship or not. (1 B. & A. 116; 1 B. & C. 574; 5 B. & Ad. 176.)—*Rex v. Inhabitants of Sandhurst*, 1 N. & P. 296.

SHERIFF.

1. (*Liability of for escape, how far bound by his return.*) In an action for an escape, the sheriff is bound by the statement in his return, not only as to the fact of the arrest, but also as to the day on which it was made.—*Cook v. Round*, 1 M. & Rob. 513.
2. A sheriff who executes a *fi. fa.* after notice that the defendant had obtained his discharge under the Insolvent Debtors' Act, 7 G. 4, c. 57, is not a trespasser. (2 Doug. 671.)—*Whitworth v. Clifton*, 1 M. & Rob. 531.
3. (*Increasing issues.*) Where a sheriff does not sell goods seized by him under a *test. fi. fa.* before he leaves office, and the new sheriff distrains him that he sell the goods seized; on a subsequent motion to increase issues, the Court will allow him to be distrained for the amount of the debt directed to be levied, and a further sum to cover the plaintiff's costs consequent on the delay, as well as the costs of the application. The rule for this purpose is absolute in the first instance.—*Nowell v. Underwood*, 5 D. P. C. 229.

And see VARIANCE.

SHIPPING.

- (*Trover—Property in ship while building—Reputed ownership.*) P. contracted with a ship-builder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, the materials being all approved by the agent before they were used. Before the ship was completed, the builder became bankrupt; the assignees afterwards completed her. All the instalments were paid or tendered.

In an action of trover by P. against the assignees for the ship: Held, that on the first instalment being paid, the property in the portion then finished vested in P. under the above contract, subject to the builder's right to retain such portion for the purpose of completing the work, and earning the rest of the price; and that each material subsequently added

became, as it was added, the property of P. as the general owner. (5 B. & Ald. 946; 8 B. & C. 282.)

Held, also, that under these circumstances the ship did not pass to the assignees as having been in the possession, order, or disposition of the bankrupt by consent of the true owner, within the 6 G. 4, c. 16, s. 72.—*Clarke v. Spence*, 4 Ad. & E. 448; 6 N. & M. 399.

SLANDER.

(*Evidence of subsequent words.*) In slander, where the words proved are unambiguous, subsequent words of the same import are inadmissible.—*Pearce v. Ormsby*, 1 M. & Rob. 455; *Symmons v. Blake*, ib. 477. But previous slander, for which damages have been recovered, may be given in evidence.—*Symmons v. Blake*, ibid.

STAMP.

1. (*Exceptions in 9 G. 4, c. 14, s. 8.*) Under Lord Tenterden's Act, 9 G. 4, c. 14, s. 8, a written memorandum acknowledging a debt may be given in evidence without a stamp, (although it contains words of agreement), where, the original debt being proved *aliunde*, the memorandum is produced merely to show the continuance of the debt.—*Morris v. Dixon*, 6 N. & M. 438.

2. A receipt indorsed on the back of a stamped deed may be separately read in evidence, though it be part of an indorsement requiring an agreement stamp.—*Ody v. Cookney*, 1 M. & Rob. 517.

3. (*On bond.*) Where a bond is conditioned for the payment of money, which is declared to be the same money as that secured by an indenture of even date, it must, in order to dispense with an *ad valorem* stamp on such bond, appear by recital, or by production of the indenture, that the latter was such an indenture as required an *ad valorem* stamp. (9 B. & C. 885.)—*Walmesley v. Brierly*, 1 M. & Rob. 529.
And see ORDER OF REMOVAL, 2.

SUBPCENA. See ATTACHMENT, 5.

TENDER.

A plea, by the acceptor of a bill of exchange, that *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill, with interest from the day it became due, and that he hath always, *from the time when the bill became due*, been ready to pay the plaintiff the amount, with interest aforesaid: Held bad on special demurrer. (8 East, 167.)—*Poole v. Tumbridge*, 2 M. & W. 223; S. C. nomine *Poole v. Crompton*, 5 D. P. C. 468.

THREATENING LETTER.

On an indictment for sending a letter, threatening to burn, &c. which is set out, it may be left to the jury to say whether the letter amounted to such threat.—*Rex v. Tyler*, Moo. C. C. R. 428.

TRESPASS.

1. (*Acquittal of one of several defendants.*) One defendant in trespass,

against whom some *prima facie* case has been made by the plaintiff, is not entitled to have his case put separately to the jury, in order to his being acquitted, and becoming a witness for the other defendants, however clear the exculpatory evidence on his part may be. (M. & M. 198, a.)—*Leach v. Wilkinson*, 1 M. & Rob. 537.

2. (*What sufficient property to maintain trespass.*) A. commissioned her brother to buy a cow for her, and a fortnight afterwards he bought one; but before the cow had come to the hands of A., or she had assented to the purchase, the defendant took the cow: Held, that A. had such a property in the cow as enabled her to maintain trespass.—*Thomas v. Phillips*, 7 C. & P. 573.

TROVER.

1. An officer in whom a right to the custody of chattels is vested by act of parliament, has not, in respect of such right merely, such a property in them as will enable him to maintain an action for the wrongful detention of them. Parish officers, or other persons, by whom parish books are, by appointment of the vestry, to be kept, cannot bring trover against a waywarden who has gone out of office, for the books of accounts, assessments, &c. kept by him while he was in office, and with the possession of which he has never parted.—*Addison v. Round*, 6 N. & M. 422.
2. (*For bill of exchange.*) If a party, authorized by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received.—*Palmer v. Jarman*, 2 M. & W. 282.

And see SHIPPING.

USE AND OCCUPATION.

Where a tenant, by a written agreement, has agreed to take premises from a future day, it is not sufficient, in an action for use and occupation, to put in the agreement, but evidence must also be given of some occupation under it.—*Woolley v. Watting*, 7 C. & P. 610.

And see MINES.

VARIANCE.

(*Judgment according to the very right of the case, under 3 & 4 Will. 4, c. 42, s. 24.*) In an action against a sheriff for an escape, and for a false return of non est inventus, it appeared, and was found by the jury, that the sheriff had negligently omitted to arrest, having opportunity, and the judge at nisi prius ordered such finding to be indorsed on the record. After verdict for the defendant: Held, that the plaintiff was entitled, under 3 & 4 Will. 4, c. 42, s. 24, to have judgment entered for him; and that the Court had no power to impose any terms on a party for whom judgment was ordered to be entered under this section.—*Geast v. Elwes*, 6 N. & M. 433.

VENDOR AND PURCHASER.

In a contract of sale entered into at an auction, one condition was, that if the purchaser should fail to comply with any of the conditions, the deposit

should be forfeited as liquidated damages: Held, that such condition formed no qualification of the general promise to complete the purchase; and that therefore, on a wrongful abandonment of the contract by the purchaser, the vendor might recover damages *ultra* the forfeited deposit, and was not bound to state this condition in declaring on the contract.—*Icely v. Grew*, 6 N. & M. 468.

VENUE. See PRACTICE, 28.

WARRANT OF ATTORNEY.

1. The Court allowed judgment to be signed on an old warrant of attorney, the application being made on the 5th of November, although the defendant had not been seen alive since the end of February preceding, and then in New South Wales.—*Johnson v. Fry*, 3 D. P. C. 215.
2. The Court allowed judgment to be entered up on an old warrant of attorney on the 5th November, the defendant having been seen alive on the 30th September.—*Stocks v. Willes*, 5 D. P. C. 221.

WITNESS.

1. (*Competency of co-contractor—Release*) In an action for work done to a vessel against one part-owner, another part-owner is a competent witness for the defendant, after a release. (Peake's N. P. C. 74; 1 Esp. 103; 4 Esp. 112; Ry. & M. 29; 4 B. & Ad. 760.)—*Jones v. Pritchard*, 2 M. & W. 199.
2. (*Competency of official assignee.*) In trover by a bankrupt against his assignee, the official assignee is a competent witness for the defendant, to sustain the bankruptcy.—*Giles v. Smith*, 1 M. & Rob. 443.
3. (*Competency.*) In case for the infringement of a patent, a purchaser of a licence to use the patent is a competent witness for the plaintiff.—*Derome v. Fairlie*, 1 M. & Rob. 457.
4. (*Same.*) A witness who may be liable to the costs of the action as special damages, may be made competent by indorsement on the record, pursuant to the 3 & 4 W. 4, c. 42, ss. 26, 27.—*Pickles v. Hollings*, 1 M. & Rob. 468. So also may a party under whom the defendant justifies in trespass. (See 1 M. & Rob. 315, *contra*.)—*Creevey v. Bowman*, *ib.* 496.
5. (*Same.*) A witness interested in the result of a suit in equity, cannot be made competent, in an issue directed in such suit, under 3 & 4 W. 4, c. 42, ss. 26, 27.

On an issue to try the validity of a modus within a certain district, an occupier of lands within the district is incompetent to prove such modus.—*Stewart v. Barnes*, 1 M. & Rob. 472.

WOUNDING.

1. To support an indictment under 9 G. 4, c. 31, s. 12, for wounding, the wound must be given with some instrument.—*Rex v. Stevens*, Moo. C. C. R. 409. Therefore, maliciously throwing oil of vitriol over prosecutor's face, with intent to disfigure, &c., and so wounding him, is not within the statute.—*Rex v. Murrow*, *ib.* 456.

2. A wound incurred by the prosecutor in forcing part of his body, in self-defence, against a weapon with which the prisoner was attacking him, is not a wound inflicted by the prisoner within the 9 G. 4, c. 31, s. 11. To constitute a wound, the external surface of the body must be divided.—*Rex v. Beckett*, 1 M. & Rob. 527.

WRIT OF TRIAL.

1. (*New-trial where damages under 5l.*) The Court refused to grant a rule for a new trial in a case before the sheriff, where the damages were under 5l., although the evidence appeared to show that it was one of several actions brought by different plaintiffs against the same defendant for aliquot parts of a sum of money exceeding 5l., which ought to have been sued for in one joint action by all those plaintiffs, being due under one entire contract by the defendant with them all.—*Williams v. Evans*, 2 M. & W. 220.
2. Where the date of the writ of summons was untruly stated in a writ of trial, the Court set aside a verdict which the plaintiff had recovered thereon, the defendant not having appeared at the trial.—*White v. Farrer*, 2 M. & W. 288; S. C. nomine *White v. Perrers*, 5 D. P. C. 463.
3. (*Certificate under 43 Eliz. c. 6.*) Where the verdict, in a cause tried before a sheriff or judge of an inferior Court, by writ of trial, under 3 & 4 W. 4, c. 42, s. 17, is for less than 40s., he has no power to certify, under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs; and the Court will not interfere to stay the proceedings on payment of the debt without costs; but *semble*, it would be a sufficient answer to an application for a writ of trial, that the sum in dispute is less than 40s. (1 Ad. & Ell. 76.)—*Jones v. Barnes*, 2 M. & W. 313; S. C. nomine *Jones v. Bond*, 5 D. P. C. 455.

RULE OF COURT.

EXCHEQUER OF PLEAS, HILARY TERM, 7 WILL. IV.

◆

“It is Ordered, That from and after the last day of the present term, no rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits; or if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded upon an affidavit showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his and their own indemnity only, and without collusion with the original defendant.

“ ABINGER.

“ E. H. ALDERSON.

“ J. PARKE.

“ J. GURNEY.”

“ W. BOLLAND.

EQUITY.

[Containing 8 Bligh, Parts 5 and 6; 9 Bligh, Part 1; 2 Clark & Finnally, Part 4; and 7 Simons, Part 2.]

ADVOWSON.

An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession according to their seniority. When the third turn came C. had died, leaving two coheirs, E. and F., between whom the right to present was disputed. F. however presented, and in the next avoidance E. presented: Held, that the presentations were to be counted, though they were usurpations of the rights of F. and D. respectively; and that on the seventh avoidance F. would again be entitled to present. (*Pyke v. Bishop of Bath and Wells and Lindsey*, Bac. Abr. tit. Joint Tenant.)—*Richards v. Earl of Macclesfield*, Sim. 257.

AGREEMENT.

A statement in the books of a corporation of the terms of an agreement entered into by them, does not bind them, although it is signed by a majority of the members.—*Carter v. Dean and Chapter of Ely*, Sim. 211.

CHARITY.

Where a meeting-house was founded by certain Protestant Dissenters for the worship and service of God, it was held, that no doctrines opposed to the opinions of the founders ought to be taught; and in order to ascertain the doctrines to be taught, which will not be presumed to have been illegal at the time of the foundation, the then state of the law must be regarded.—*Att.-Gen. v. Pearson*, Sim. 290.

COSTS.

1. (*Taxation*.) A married woman having separate property, employed a solicitor, and undertook to pay him out of her separate estate. By a decree in a suit instituted by the solicitor, his bills were ordered to be paid out of the separate property, and it was referred to the Master to tax them. *Semble*, that the solicitor was entitled to the costs of taxation, though more than one-sixth was taken off. (*Benton v. Bullard*, 4 Bing. 361.)—*Murray v. Barlee*, Sim. 194.
2. (*Subpana*.) It seems that where a decree directs the plaintiff to pay the costs of one of the defendants, and to have them over again from another defendant, and that defendant to pay the plaintiff's costs; the plaintiff is

not at liberty to issue more than one *subpœna*, nor more than one attachment for both sets of costs.—*Chute v. Ross*, Sim. 255.

3. (*Appeal*.) Upon an appeal and a cross-appeal, the House of Lords being of opinion that the appellant in the original appeal, as mortgagee, ought to have obtained the decree with costs in the Court below, gave him costs in the cross-appeal upon the principle of indemnity.—*Morgan v. Evans*, 8 Bli. 777.

DEBTOR AND CREDITOR.

The balance of an account was settled by an award in 1799, which was not acted upon. In 1819 a balance in respect of this and other accounts was ascertained, and a mortgage to secure the amount was executed. Judgments and executions, which had been obtained by the creditor, were then outstanding against the debtor, and in 1827 and 1828 the creditor proceeded upon the judgments for parts of the amount secured by the mortgage.

Upon a bill to set aside the mortgage and open the account, upon the ground of oppression by the creditor, and errors in the account, and a cross-bill to establish the deed, and take the account upon the proof of it, a decree was made, dismissing the original bill, and directing the account as upon the cross-bill. The decree was affirmed upon appeal, except as to a certain sum, part of the amount secured for insurances upon the life of the debtor, it not being alleged or proved that the creditor had paid such insurances, and also such parts of another sum as had been paid by the debtor for costs, which had been erroneously included in the amount secured by the mortgage; in respect of which sums the decree was reversed.—*Marquis of Donegal v. Grattan*, 8 Bli. 831.

DOMICILE.

By the law of Holland the surviving parent is entitled to the income of the children's property until they attain 18.

By a judicial compromise of a suit in Holland, two infant children, who were domiciled in this country, were adjudged to be entitled to one-fourth of their deceased mother's personal estate: Held, that the father was not entitled to the income of this property until they attained the age of 18.—*Gambier v. Gambier*, Sim. 263.

DONATIO MORTIS CAUSA.

The obligee in a bond gave it to her niece, and afterwards, in her last illness, and five days before her death, signed a memorandum, purporting to be an immediate and absolute assignment of the bond to her: Held, that in the absence of evidence to show when the bond was delivered, and the assignment being absolute, and not conditional on the obligee dying, there was no *donatio mortis causæ*.—*Edwards v. Jones*, Sim. 325.

EVIDENCE.

A suit was instituted in the Court of Chancery in England, to carry into execution the trusts of a deed executed by D. in 1799, for the benefit of credi-

tors holding debentures: the assignees of a bankrupt firm claiming under two debentures which had been deposited with the firm for balances due and to become due to them, went in under the decree to prove their claim. The Master reported that the sum secured by one of the debentures was due under the deed, but that there was not sufficient proof to establish the right of the claimants. Pending this suit a bill was filed in the Court of Chancery in England, for the administration of the estate of the bankrupt firm, in which, by an order of the Court, a receiver of that estate was appointed. A bill was then filed in the Court of Chancery in Ireland, by the assignees of the bankrupt firm and the receiver, for the same purpose as the suit then pending in England. In this suit proof was given before the Master of the execution and assignment of the debenture, and of the search for and loss of the original, and of an examined copy. Upon this proof a decree was made, declaring the right of the assignees for payment of a certain portion of the sum due upon the debenture to the receiver in the English suit.—*Marquis of Donegal v. Salt*, 8 Bli. 833.

2. If the validity, and not the execution of a deed is questioned in a suit, it may be proved *vivâ voce* at the hearing.—*Att.-Gen. v. Pearson*, Sim. 309.

EXECUTOR.

Payments made by an administrator *de son tort*, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, will not be allowed. (*Padget v. Priest*, 2 T. R. 97.)—*Layfield v. Layfield*, Sim. 172.

HUSBAND AND WIFE.

1. By a marriage settlement, a fund, the property of the wife, was settled on her and her husband, and their issue, and in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her: Held, that the husband took the fund, to the exclusion of the Crown.—*Smither v. Willock*, 9 Ves. 233.
2. A testator gave a sum of money to trustees in trust only, for the use and benefit of his adopted daughter, C. D., and which he desired might be paid to her, and to be settled on her during her life, at the time of her marriage, or, in case she did not marry, then the interest of the money, being vested in government securities, to be paid to her; and in the event of her not marrying or dying, then the money to be divided equally between his nephews. The daughter married, and shortly afterwards died without issue: Held, that her husband, as her administrator, was entitled, in exclusion of the nephews of the testator. (*Adamson v. Armitage*, 19 Ves. 416.)—*Hawkins v. Hawkins*, Sim. 173.

INFANT.

A bill filed on behalf of an infant was ordered to be taken off the file, with costs to be paid by the next friend, he being a person in low circumstances and of immoral character, and there being reason to suppose that he had

instituted the suit from spite against one of the defendants.—*Walker v. Else*, Sim. 234.

INTEREST.

Morgan having obtained judgments against Lewis on warrants of attorney which carried interest and having been in possession and receipt of the rents of lands belonging to Lewis in respect of which he was by decree ordered to account, with interest: Held, that the judgments ought to carry interest.—*Morgan v. Evans*, 8 Bl. 777.

MAINTENANCE.

A testator gave two-fifth shares of his personal estate to his son-in-law, the plaintiff, in trust, to apply the same for the maintenance and use of his, the plaintiff's, children by the testator's late daughter: Held, that the plaintiff was entitled to apply the interest of the two-fifths for the maintenance of his children, notwithstanding he might be of ability to maintain them.—*Hawkins v. Watts*, Sim. 199.

MARRIED WOMAN.

1. (*Minor—Consent.*) The Court will take the consent of a married woman, though a minor, to the payment to her husband of a sum to which she is entitled.—*Gullin v. Gullin*, Sim. 236.
2. (*Maintenance.*) Part of the capital of a fund in Court belonging to a married woman, who was deranged, and had been deserted by her husband, was ordered to be applied for her maintenance.—*Peters v. Grote*, Sim. 238.

MEETING HOUSE.

The management of a dissenting chapel was vested in the communicants. The congregation being dissatisfied with their minister, held a meeting, at which they resolved that he should be recommended to resign. Neither the minister nor a majority of the communicants was present at the meeting; but the resolution was afterwards signed by a majority of them and communicated to the minister: Held, that this was tantamount to a dismissal.—*Attorney General v. Aked*, Sim. 321.

MORTGAGE.

1. Where money is secured by a mortgage for a term, and by a trust for sale of the fee, the mortgagee, if he files a bill praying for a sale only, is not entitled to foreclose the fee, nor, unless he amends his bill, to foreclose the term.—*Kerrick v. Saffery*, Sim. 317.
2. If the plaintiff in a suit of redemption does not pay the principal and interest at the time appointed, he will not be allowed to redeem, although before the motion to dismiss is made he has tendered the amount reported due, with the subsequent interest. (See *Novosielski v. Wakefield*, 17 Ves. 417.)—*Faulkner v. Bolton*, Sim. 319.

PARTNERSHIP.

A. and B., tenants in common, agreed to form a partnership, and afterwards entered into partnership as maltsters and biscuit bakers. From time to time they made purchases of land with the partnership monies. Some of the

lands so purchased were not conveyed to them, but others were conveyed, as to one moiety to A., who was a bachelor, in fee, and as to the other moiety to B., who was married, and a trustee, to bar dower. The lands were used solely for farming and agricultural purposes, but all the receipts and payments in respect of them were entered in the partnership books and carried to the account of the partnership. The farming business was continued until A.'s death, but the malting and biscuit baking had ceased several years before: Held, that the lands purchased were not converted into personalty.—*Randall v. Randall*, Sim. 271.

2. A. and B. having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and some debts also owing from the partnership. B. entered immediately into partnership in the same business with C., and it was agreed between them, but not in writing, that upon B.'s bringing into the new partnership 40,000*l.* of good debts owing from customers of the then late partnership, for the purpose of meeting claims of debts from that partnership transferred to the accounts of the new partnership, B. should be entitled to two-thirds of the new partnership, and C. to one-third. This partnership business was carried on for fourteen years without any settlement of accounts, or any entry in the books declaring the terms of the partnership. It appeared that within the first five or six years 40,000*l.* were received from the debtors of the former partnership, but not so much if the advances to them by the new firm were deducted from their payments: Held, that this sum was brought in within the meaning of the agreement.—*Toulmian v. Copland*, C. & F. 681; Bl. 918.

PLEADING.

1. (*Husband and Wife*.) A husband and his wife ought not to join as co-plaintiffs in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend, and the husband be made a defendant.—*Sigel v. Phelps*, Sim. 239.
2. (*Multifariousness*.) J. D. founded a school, and gave lands to a guild or fraternity for providing a master for the school. Some years afterwards he gave lands to a college, on condition of their maintaining five scholars, to be chosen by the guild from the school; and he directed that the master of the school should be chosen and removed (when necessary) by the guild, with the advice of the master and fellows of the college. By an act of parliament the guild was dissolved, and the electing of scholars to be sent to the college was given to the schoolmaster and the vicar and churchwardens of the parish, and the appointing of the schoolmaster was given to the college, and in their default to the Archbishop of York: Held, that the school and the scholarship were distinct foundations, and therefore that an information relating to abuses in both of them was multifarious, and that the Archbishop ought to have been made a party. (*Marcos v. Pebrer*, 3 Sim. 406.) —*Attorney General v. St. John's College*, Sim. 241.
3. (*Parties*.) A. was entitled to rents up to a certain time, and B. was entitled to them subsequently. B. filed a bill for an account of the rents for

the whole period, alleging that he had settled all A.'s claims out of his own monies, but did not make B. a party: Held, that B. was a necessary party.—*Attorney General v. Pearson*, Sim. 290.

4. (*Supplemental suit.*) After a decree, one of the defendants became insolvent, and his assignees, without notice to the plaintiff, filed a supplemental bill against all the parties to the suit. Afterwards the plaintiff filed a supplemental bill against the assignee alone. A motion by the assignee, that the plaintiff's supplemental bill might be taken off the file for irregularity, was refused.—*Phillips v. Clark*, Sim. 231.

POWER.

If the donee of a power appoints the fund to one of the objects of the power, on an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad.—*Arnold v. Hardwick*, Sim. 343.

PRACTICE.

1. (*Commission.*) Under the 17th Order of 1831, a plaintiff, though he does not want a commission, is not at liberty to give a rule to pass publication until the expiration of three weeks from the service of the subpoena to rejoin.—*Flight v. Jones*, Sim. 256.
2. (*Contempt.*) A defendant cannot object to a cause being heard, on the ground that the plaintiff is in contempt.—*Ricketts v. Mornington*, Sim. 200.
3. (*Same.*) A defendant who was in contempt for want of answer, was brought up from the King's Bench prison, under 11 Geo. 4 and 1 Will. 4, c. 36, rule 6, and turned over to the Fleet, and a counsel and solicitor were assigned him. He did not however put in his answer: Held, that the bill could not be taken *pro confesso* under the second rule, until the defendant had been again brought up and remanded.—*Viscountess Barnewall v. Cooke*, Sim. 320.
4. (*Master's report.*) Where a debt was found due by the Master's report, to which no objections or exceptions were taken, and no error appeared on the face of the report, held, that the report could not be reviewed by an order made on further directions.—*Morgan v. Evans*, 8 Bli. 777.
5. (*Same.*) Where a party to a suit objects to a separate report, he must except to it in the usual manner, and not by petition pray for leave to except.—*Drever v. Maudsley*, Sim. 240.

RAILWAY.

1. An agreement not to oppose a railway bill in parliament is not illegal.—*Edwards v. Grand Junction Railway Company*, Sim. 337.
2. The projectors of a railway, pending a bill in parliament for incorporating them, made an agreement on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn: Held, that the agreement was binding on the railway company when incorporated.—*S. C.*

RECEIVER.

The Court has no jurisdiction to order, in a summary way, the executor of a

deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets.—*Jenkins v. Briant*, Sim. 171.

SETTLEMENT.

1. R. M., on his marriage with G. H., surrendered to the use of trustees certain copyhold premises, upon trust for R. M. for his life; and after his death, for G. H. for her life; and after the death of the survivor, that the trustees should surrender the premises to the use of such child or children of the marriage as R. M., and in default, as G. H. should appoint; and in default, then to the use of all and every the child and children, their heirs and assigns, for ever, according to the custom of the manor, as tenants in common; and if but one, then to the use of such only child, his or her heirs or assigns, for ever, according to the custom of the said manor; such surrender to be made at the costs of such child or children who should be entitled to take by virtue of the limitation: and in default of issue of the body of R. M. and G. H. living at the time of the death of the survivor, then upon trust to surrender the premises to the use of the right heirs of R. M. for ever, according to the custom of the manor; such surrender to be at the costs of such person or persons who by virtue of the last-mentioned limitation should be entitled to take the same. There was issue of the marriage one child only, E. M. R. M. died in 1779. By his will, reciting the surrender and settlement, and that he had other lands, parcel of the manor of Taunton Deane, which were not settled, in order to make some provision for his daughter he had surrendered his Taunton Deane lands to J. H. upon trust to perform his will; he devised to J. H. all his Taunton Deane lands (not settled), upon trust to sell, and with the purchase monies and his personal estate to pay debts &c., and apply the overplus for the maintenance of his daughter, and when she attained the age of 21, to pay the overplus to her for her own use. His widow held the premises until her death in 1819. E. M. died in 1812, having by her will devised all her lands, &c. to J. H. R. M. had no brother who survived him: Held, that J. L. the youngest sister of R. M., and his heiress, according to the custom of the manor, was entitled to the settled premises.—*Bush v. Locke*, 9 Bl. 1.

SOLICITOR.

Where a bill was ordered to be taken off the file, on the ground that the plaintiffs assumed to sue in a corporate character, to which they were not entitled, the costs were ordered to be paid by the town agent of the plaintiffs, and not by their solicitor in the country.—*Corporation of Ruthin v. Adams*, Sim. 345.

2. Upon a bill by L. against M., his solicitor, for a general account, and a taxation of his bill, and a decree directing the examination of the parties upon oath, M. filed interrogatories for the examination of L., which he refused to answer; and thereupon an affidavit was filed by M. under an order of Court, verifying the allegation of facts suggested in his interrogatories: Held, that this affidavit was sufficient evidence of the advance of money therein mentioned to have been advanced to L.—*Morgan v. Evans*, 8 Bl. 777.

SPECIFIC PERFORMANCE.

1. Time is, to a great extent, of the essence of a contract entered into with an ecclesiastical corporation. Therefore where A. agreed to take a concurrent lease of a dean and chapter, and to pay the fine in January, but was not ready with the money in March following, a bill filed by him for a specific performance was dismissed with costs.—*Carter v. Dean and Chapter of Ely*, Sim. 211.
2. A. having contracted to purchase a house, agreed with K. to transfer to him the benefit of the contract for a sum of 3000*l.*, and to obtain for him a conveyance of the premises; whereupon a memorandum was drawn up in the following terms:—"Mr. K., when the title to the plaintiff's estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3000*l.*, upon receiving a proper release from you and Mr. Wilson for the same. I am yours, J. K. 15th June, 1818." A. immediately afterwards borrowed 3000*l.* of B. upon the undertaking of K., and delivered an order to K. to pay the money to B. It appeared that the contract was made with Wilson, who was an uncertificated bankrupt; the name of A. being used as a cover against his assignees. A bill to enforce the agreement was dismissed.—*Staley v. King*, 8 Bl. 716.

TIMBER.

- J. M. devised an estate to a trustee in trust to settle it on A. for life, with power to cut timber for repairs only, remainder to B. for life, *sans waste*, remainder to his first and other sons in tail. The trustee, under a surveyor's advice, and with the consent of the tenants for life, ordered timber on the estate to be felled, and invested the proceeds in the purchase of stock in his own name: Held, that A. was entitled to the dividends of the stock for life; all parties to be at liberty to apply at her death. (*Tooker v. Annesley*, 5 Sim. 235.)—*Waldo v. Waldo*, Sim. 261.

TITHES.

1. Under certain powers created by the statute 17 Cha. 2, c. 3, A., by his will, dated 1671, gave all the tithes of hay, corn, grain, and all other tithes, great and small, of the parish of B., to H. F., his heirs and assigns, to the use of a preaching minister, to be nominated by H. F. and his heirs. In 1706 T. F., the descendant and heir of H. F., conveyed the tithes, with other hereditaments, in trust for the payment of creditors, who filed a bill, and obtained a decree for sale, under which they were sold; and in 1716 conveyed to R. F. and J. H. (a trustee for R. F.), and their heirs and assigns, in trust as to the tithes of B., to the use of a preaching minister, to be nominated by R. F. and his heirs. J. H. survived R. F., and became seised of the legal estate; and his descendant and heir, in 1826, conveyed the tithes of B., &c. to T. L. F., the heir of T. F., upon the original trusts. Before this conveyance, T. L. F., who then had the equitable estate in the tithes of B., appointed E. the preaching minister of B.: Held, on a bill by T. L. F. and E. for tithes, that the title derived

under the will of A. and the decree, was good in equity, and the appointment of E. valid.—*Holdsworth v. Fairfax*, 8 Bl. 882.

2. A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green.—*Lewis v. Bridgman*, C. & F. 738; Bl. 907.

TRUST.

The agent and solicitor of a trustee, before the winding up of a trust, paid the trust money to his bankers, to the credit of his general account with them; and informed the *cestui que trust* that the money was lying idle at his bankers. The *cestui que trust* took no notice of the information; and, more than a month afterwards, the bankers failed: Held, that the agent and trustee were jointly liable for the loss.—*Macdonnell v. Harding*, Sim. 178.

WASTE.

- F. N., tenant for life, without impeachment of waste, except as to the "timber growing in the park, avenues, demesnes, lands, and woods adjoining to the capital messuage," cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage: Held, that this was equitable waste.—*Newdigate v. Newdigate*, C. & F. 801; Bl. 734.

WILL.

1. (*Legacy Duty*.) A testator, by his will, gave an annuity to his grandson, and directed his executors to pay the legacy duty on all the legacies and annuities given by his will. By a codicil he gave an annuity to his grandson in lieu of the annuity given by his will: Held, that this annuity was to be paid free from legacy duty.—*Earl of Shaftesbury v. Duke of Marlborough*, Sim. 237.
2. A testatrix bequeathed her residuary estate to trustees, in trust to pay and divide the interest between her two nieces, equally, during their lives, and, after their deaths, to pay and divide the principal unto and amongst the lawful issue of her said nieces, or of such of them as should leave issue, equally, *per stirpes* and not *per capita*; and, in default of such issue, to pay the interest to certain other persons, for their lives. One of the nieces died, having had seven children, five only of whom survived her: Held, that those five became entitled, on the mother's death, to her moiety of the residue.—*Cross v. Cross*, Sim. 201.
3. T. P. bequeathed his personal estate to his wife for life, and after her death, to a trustee, in trust to pay the rents and profits of his personal estate, for and towards the support and maintenance of his six nephews and nieces; and in case of the death of any of them, for the maintenance and support of the survivors. All the nephews and nieces survived both the testator and his widow. One of the nieces then died: Held, that the niece, by surviving both the testator and his widow, became absolutely entitled.—*Clarke v. Gould*, Sim. 179.
4. A testator bequeathed a sum of stock to A. and B., for their lives, and,

on their deaths, to their children then living who should attain 21, with a gift over to the survivor of A. and B., in case the children of either of them should die under 21. A. died, leaving a child who had attained 21. B. afterwards died, without having had a child: Held, that A.'s personal representatives were entitled to B.'s moiety of the stock. (*Mackinnon v. Sewell*, 5 Sim. 78; 2 M. & K. 202.)—*Ailon v. Brooks*, Sim. 204.

5. Lord V. bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord V.; it being his will that the same should, after the decease of his wife, be held with the title, as far as the rules of law and of equity would permit. The testator left his wife and son surviving him, and also two grandsons. After the death of the wife and son, the eldest grandson succeeded to the title, and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant, and unmarried, leaving the second grandson of the testator surviving him: Held, that the chattels vested absolutely in the eldest grandson, on succeeding to the title.—*Tollemache v. Coventry*, C. & F. 811.
 6. A testator directed his trustees to invest such a sum as would produce 40*l.* a year, and to pay the same to his daughter, and, after her death, to transfer the fund to his residuary legatees: and he gave 100*l.* to his daughter absolutely. By a codicil he revoked the sum of 1200*l.*, given to his daughter for her life, and gave her 500*l.* in lieu thereof: Held, that as 40*l.* a year was the only sum given to the daughter for her life, it was revoked by the codicil.—*Pitcher v. Hole*, Sim. 208.
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BANKRUPTCY.

[Containing 4 Deacon & Chitty, Part 4 ; and Deacon, Part 3.]

ACCOUNTS.

The bankrupts had been in the habit of making payments and receiving money for the petitioner, no account of which had been rendered by the bankrupt, but the account was abstracted from his books after his bankruptcy. It did not appear, however, that for the last six years he had made any payment to the petitioner, or had received any money for him, but that the only transaction during that period was a certain annual payment made by him for the petitioner: Held, that such payment was evidence of a running account, and took the case out of the statute of limitations.—*Exp. Peachy*, D. 531.

ASSIGNEES.

1. (*Choice of*.) Where the notice of the meeting for the choice of assignees was advertised in the Gazette only three days before the meeting took place, and the creditors at a distance had no opportunity, from the shortness of the notice afforded them, of attending such meeting ; it seems that this was a sufficient ground for setting aside the choice of assignees.—*Exp. Morris*, D. 498.
2. (*Choice—Bankrupt.*) Upon a petition to remove assignees, on the ground of their having proved fictitious debts, and having fraudulently connived with the bankrupt to get elected to that office ; the Court will direct an inquiry into the truth of the allegations in the petition, if it has reason to suspect that the bankrupt in any way interfered in the choice, notwithstanding the more serious charges brought against the assignees are denied by them on oath, and only supported by the statement of the petitioner.—*Exp. Molineux*, D. 603.
3. (*Suit by.*) It seems that the assignees are justified in commencing a suit in equity without having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose, provided they subsequently obtain the approbation of the creditors whose debts are of the requisite amount.—*Exp. Llewellyn*, D. 474.
4. (*Removal.*) Where one of several assignees is removed, the creditors are entitled to the option of electing another in his room, if they think fit.—*Exp. Rolls*, D. 618.

And see TRUSTEE, 3.

BANKRUPT.

1. Where the bankrupt, who traded as a draper at Carnarvon, and had contracted debts with creditors in Lancashire, was described in the fiat, as "of Geufron, in the county of Carnarvon, draper, dealer and chapman," a place where he merely resided, and did not carry on the drapery business;—the fiat was annulled, at the costs of the petitioning creditor.—*Exp. Morris*, D. 498.

COMMISSIONER.—See FEES.

COSTS.

1. (*Taxation of*.) The petitioning creditor's costs, up to the choice of assignees, had been taxed and paid to the solicitor two years: Held, nevertheless, that objectionable items having been stated on affidavit, an order might be made for re-taxation as against the solicitor of the petitioning creditor, without bringing the petitioning creditor himself before the Court.—*Exp. Moore*, D. 578.
2. (*Praying*.) Leave to surrender after the 42nd day, where the bankrupt has not been guilty of any misconduct, will be given with costs out of the estate, though petition does not pray costs.—*Exp. Smith*, D. & C. 820. And see *TAUSTEIN*, 3.

EQUITABLE MORTGAGE.

1. F. M. the bankrupt, deposited the lease of two houses with the petitioner, for securing 600*l.*, accompanied with an agreement in writing; and on the same day he signed another agreement engaging to pay 85*l.* per annum, being the improved rental of the premises, the leases of which are deposited with the petitioner, viz. 45*l.*, being the improved rental of a house in the occupation of J. H.; 20*l.* being the improved rental of the adjoining premises, let to J. H., as tenant at will; and 20*l.* being the improved rental of premises in the occupation of A. B.; the said 85*l.* to be collected by me, and paid over to the petitioner. The lease of the premises let to J. H., as tenant at will, had not been, in fact, deposited with the petitioner, but only the lease of the other premises in the occupation of J. H., and the lease to A. B.: Held, that it was clearly the intention of the bankrupt to give the petitioner an interest in the premises specified in the agreement, to all which the petitioner's lien extended. *Exp. Edwards*, Dea. 611.
2. The usual order for a sale of an equitable mortgage was made, notwithstanding that there was no deposit of deeds, but a mere agreement. *Exp. Jones*, D. & C. 750.

FEES.

The fees payable under the Stat. 1 & 2 W. 4, c. 56, ss. 45, & 46, to the secretary of bankrupts, will not be dispensed with where a country fiat is annulled, because the Commissioners decline to act and a new fiat is proposed to be taken out in London.—*Exp. Smith*, D. & C. 810.

JURISDICTION.

The Court of Review, it seems, has no jurisdiction except what the Lord Chancellor was accustomed to exercise upon petition in bankruptcy.—*Exp. Bignold*, D. 515.

MORTGAGE.

The petitioners equitable mortgagees having discovered that the bankrupt had made other mortgages, and created other charges on the property, the priorities of which they disputed, prayed a sale, and that the proceeds might be applied towards the reduction of their debt; and in case the other parties should come in and submit to the jurisdiction of the Court, then that the Court would settle the respective priorities of those parties and of the petitioners: Held, that the Court could make no order in the absence of those parties, nor until the interest of all were ascertained.—*Exp. Bignold*, D. 515.

PROOF.

Where a creditor, having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint-estate, and did not discover, till seven months afterwards, that they were bought on the separate account of one of the partners: Held, that he might transfer his proof from the joint to the separate estate.—*Exp. Vining*, D. 555.

REPUTED OWNERSHIP.

1. A bankrupt whose wife, previous to his marriage, was entitled to some shares in a Gas Company, which were standing in her name, deposited the certificates with a banking company, for the security of advances, but no notice was given to the Gas Company until after the act of bankruptcy: Held, that the Banking Company could not claim the shares.—*Exp. Spencer*, D. 468.
2. A., B., and C. dissolve partnership, by A. retiring, and assigning his share in the partnership property to B. and C., who continue to carry on the business. B. and C. covenant to pay a certain sum to A. by instalments; and it was provided, that if any instalment should be in arrear for sixty days, A. might enter and take possession of all the partnership property; and that from and after such entry, the assignment of A.'s share should be void; and B. and C. further covenanted, that immediately after such entry, "or in lieu of such entry, so soon as such right of entry should arise," they would re-assign all the property to A. B. afterwards retires and assigns his share to C., who subsequently becomes bankrupt; and the instalments fall into arrear; some of them, however, continue to be paid to A. by C.'s assignees; and the assignees also receive some of the debts owing to the original firm of A., B., and C.: Held, that these debts were not to be considered as in the order and disposition of C., with the assent of A., and that the assignees were accountable to A. for their receipts.—*Exp. Pemberton*, D. 421.

RE-SALE BY PURCHASER.

Where a purchaser of the bankrupt's estate re-sells it, before a conveyance is executed to him by the assignees, the Court will, at his instance, order the assignees to convey the estate directly to the sub-purchaser, if no imputation is thrown on the fairness of the first sale; notwithstanding the estate has been re-sold at a profit.—*Exp. Anderdon*, D. 585.

SECURITY.

Where a creditor, who had proved a bond debt, had subsequently lost the bond, the Court made an order that he might receive the dividends on his debts without producing the bond, upon affidavit of the facts, and indemnifying the assignees.—*Exp. Robins*, D. 587.

SET-OFF.

P. & Co. having borrowed money from the Bank of Bengal, deposited company's paper by way of collateral security, accompanied with an agreement in writing, authorizing the bank, in default of re-payment, "to sell the company's paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default was made, P. & Co. were declared insolvents, under the Indian Insolvent Act, 9 G. 4, c. 73; by the 36th section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set-off against the other; and that all such debts, as might be proved under a commission of bankruptcy in England, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency the bank were also holders of two promissory notes of P. & Co., which they had discounted for them before the transaction of the loan, and the agreement as to the deposit of the company's paper. The time for the re-payment of the loan having expired, the bank sold the company's paper; the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co. against the bank, to recover the amount of this surplus: Held, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the act.—*Young v. The Bank of Bengal*, Dea. 622.

TRUSTEE.

1. (*Charging with interest.*) A trustee, under a deed of trust, who prayed by a former petition to annul the fiat, and failed, but consented to have the account against him taken on that petition by reference, was ordered to pay the costs of that petition, and to pay the balance in his hands, under the trust deed, to the assignees, with interest at 4l. per cent., from the date of the order of reference, although there was no evidence of interest having been made of the costs of reference to be paid out of the estate.—*Exp. Harding*, D. & C. 793.
2. (*Assignee.*) The trustees, under a deed of trust for the benefit of creditors, issued a fiat against the debtor, and thereby prevented creditors dissenting from the trust deed from issuing an adverse fiat. The trustees continued to manage the property under the trust deed, but prosecuted the fiat no

further than to get themselves appointed assignees. Upon a petition of the adverse creditors to annul the fiat and issue a new one: Held, that the trustees, being the persons to account, could not possibly be assignees, and must be removed.—*Exp. Mendel*, D. & C. 725.

3. (*Bankrupt—Costs.*) Where a *cestui que trust* applies for the removal of a bankrupt trustee, who is served with the petition, he is entitled to the costs of his appearance.—*Exp. Whitley*, D. 478.

VENDOR.

The bankrupt had bought some freehold property by auction, and had paid a deposit of 20l. per cent. on the amount of the purchase-money; but there being some dispute about the title, the purchase was not completed before the bankruptcy. Upon a petition by the vendor, that the assignee might be ordered to deliver up the agreement, and that the vendor might retain the deposit-money, a special order was made, giving the assignee a fortnight to elect whether he would fulfil or abandon the agreement, without prejudice to his right to a return of the deposit-money.—*Exp. Bridger*, D. 581.

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PRISONERS' COUNSEL—PRACTICE.

MEMORANDUM.

At a meeting of twelve of the Judges, for the purpose of choosing the spring circuits of 1837, (LITLEDALE, J., BOSANQUET, J., and COLERIDGE, J., being absent from indisposition), a discussion took place as to some points which were thought likely to occur at the assizes, in consequence of the recent act for allowing prisoners, indicted for felony, to make full defence by counsel; and the following seemed to be the course of practice which the judges present thought it would be most advisable to adopt:—

1. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to the reply upon it.

3. That the witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination; and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

4. If the only evidence called, on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.

5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.

EVENTS OF THE QUARTER.

THE following Bills, or Notices of Bills, are now before Parliament:—To empower the Lord Chancellor and the Judges to make orders relating to the custody of infant children of tender age, in cases where the parents are living apart, upon the application of either of such parents, or on the return to writs of habeas corpus issued at the instance of the father, Mr. Serjeant Talfourd;—To amend the Law of Copyright, Mr. Serjeant Talfourd;—To establish Local Courts, Mr. Roebuck;—To amend the Law of Costs and the General Issue, Sir F. Pollock;—To abolish Grand Juries, Mr. Prime;—To amend the Law relating to Mortgages on Ships and Vessels, Mr. G. F. Young;—To regulate the Power of Judges to commit for Contempt, Mr. Lechmere Charlton;—To extend the Uniformity of Process Act, Mr. Elphinstone;—To amend the Law of controverted Elections, Mr. C. Buller;—To regulate the Keeping of the Records, Mr. C. Buller;—To amend the Law of Libel, Mr. O'Connell;—To regulate Admission to Inns of Court and Calls to the Bar, Mr. D. W. Harvey;—To amend the Law of Wills, The Attorney-General;—To amend the Acts regulating Attorneys and Solicitors, Mr. Tooke;—For the better regulation of the Offices of Sheriff, Under-Sheriff, &c., Mr. Tooke;—To amend the Jurisdiction of the Recorders' Courts, Mr. Stuart Wortley;—For the better Registration of Voters, The Attorney-General;—For the regulation of Prisons, Mr. Fox Maule;—For facilitating the Recovery of Possession of Premises after determination of Tenancy, Mr. Aglionby;—To abolish Imprisonment for Debt, and alter the Law of Debtor and Creditor, The Attorney-General;—To regulate the Offices in the Common Law Courts, Mr. Serjeant Goulburn;—To authorize Courts of Quarter Sessions to reserve points of Law in Criminal Cases, &c., Sir E. Wilmot; besides several Bills for the amendment of the Criminal Law, and various other comparatively unimportant measures directly or indirectly affecting the administration of the Law

One of the most important and least understood of these proposed alterations is that which stands first upon our list, Mr. Serjeant Talfourd's motion to amend the Law relating to the custody of Children of tender age. The law at present stands thus :

The father has a right over his child from the hour of its birth, and may, if he so pleases, enter by force or stratagem the house where his wife shall have taken refuge, seize the infant at her very breast, and deliver it over to the care and nurture of strangers.

He may forsake his wife for a mistress, and avow his intentions of persisting to keep that mistress, and yet may by law claim from his wife her infant female children; and should she resist his claim, she is subject to imprisonment for contempt of Court.

The child may be diseased and dying, and it may be proved that this was the sole reason for the mother endeavouring to retain possession of it, but the Court of Law will take it from the custody of the mother, and deliver it over to any stranger the father may choose to appoint.

He may deny all access to the children ; remove them from place to place, with a view to prevent the mother from even obtaining intelligence of their welfare ; give them into the care of utter strangers, and forbid those strangers to afford any clue to the place of abode of the children, and the Courts of Law cannot even make an order that the mother shall have access to her children, or see them.

The cases are subjoined.¹—In *De Manneville's* case, the defendant, a needy French emigrant who had married an English woman possessed of property to the amount of £700 a year, after trying various other modes of persecution to compel her to make a will in his favour, forcibly deprived her of her child, then at the breast. In *Mrs. Greenhill's* case, the husband was living in avowed adultery with a mistress, from whom he positively refused to separate. In *Mrs. M'Clellan's* case, the child, a little girl, was in a very delicate state of health, and it was alleged in justification of the mother's eagerness, that two of her children had died of the same complaint ; yet we find Mr. Justice Patteson (a judge as remarkable for humanity as for profound learning and sound judgment) deciding, "I feel myself bound to say that the child must be delivered up to Miss —, whom the father has named. It might be better, as the child is in a delicate state of health, that it should be with the mother, but we cannot make an order on that point."

This is a state of things which it is quite impossible to justify, and the very least that can be done, now that public attention has been attracted to it, is to invest the Judges with the fullest discretionary powers of interference. At present, their uniform conclusion is—"We admit, we deplore the hardship, the injustice, the misery, but we have no power to administer relief." Strong grounds, however, might be urged by the accomplished and eloquent proposer of the amending Bill for going still further—for giving the *prima facie* right to the custody of children of tender age to the mother ; and the inconvenience of a subsequent change of custody strikes us to be the only argument of force against establishing by positive enactment that which the laws of nature have undeniably ordained. What is the fostering care of the most affectionate father compared with the intense, passionate, all-engrossing devotion of a mother to her child ? Or how could or when will a man minister to all those nameless wants of infancy which woman's love instinctively anticipates ?

The Bills for the amendment of the Criminal Law, proposed by the Commissioners, have been already laid before the public by the newspapers. The chief grounds on which these alterations are recommended are stated in the last Criminal Law Report², reviewed in a former Number. The correspondence between Lord John Russell and these gentlemen, is principally remarkable for the tenacity with which they cling to their former proposal of a digest ; for the composition of which, allowing it to be required, they have shown themselves radically unfit.

The Local Court Bill may be regarded as defunct, the member who has taken charge of it being the member of all others the most calculated to exasperate opponents and render lukewarm the advocates of the scheme. But it seems not improbable that the jurisdiction of the Under-Sheriffs' Court, (now limited to 20*l*.) may be enlarged.

To prevent bills relating to Small Debts' Court from being shuffled through the

¹ *The King v. De Manneville*, 5 East, 221 ; *Skinner v. Skinner*, 9 Moore, 278 ; *M'Clellan's* case, 1 Dowl. P. C. 81 ; *Ball v. Ball*, 2 Sim. 35 ; *The King v. Greenhill*, 6 Nev. & Man. 244.

² 16 Law Mag. 368.

House, Mr. C. Buller has given notice of a motion to the effect, that no bill affecting the administration of justice shall be regarded as a private bill.

It is believed that nothing will be done, though something may be attempted, during the present session in the matter of Chancery Reform. A demonstration was made by Mr. Pemberton, in the shape of a call for returns, but the intention, if ever entertained, of founding any specific measure or motion upon them, has been dropped. The Lord Chancellor continues to give general satisfaction in his court.

Mr. Pemberton has given notice of a motion for the repeal of Attorney's Certificates—a measure of doubtful utility.

It is understood that the Select Committee appointed to report on the privileges of the House of Commons, as affected by Lord Denman's decision in Hansard's case, are unanimously of opinion that the Chief Justice was wrong, whilst the weight of living judicial authority is with his Lordship. We shall discuss the question on the appearance of the Report.

The Bill drawn by Mr. Tyrrell, for the amendment of the Law of Wills, has passed the House of Lords, where, we hear, Lord Brougham has exercised a most mischievous ingenuity in damaging it; no one in his present dubious state of political feeling caring to quarrel with him about such a matter, for fear of converting him into an enemy. During its slow progress through the House of Lords, the Bill had been considerably improved. At Lord Brougham's suggestion it has been restored to its original state, for no other purpose, that we can discover, than that of enabling him to state that nothing had been done.

We understand that the present intention of the Ministry is to make the Master of the Rolls the nominal guardian-in-chief of the Records, and give the actual care and direction to a deputy appointed by the Government.

Mr. Justice Gaselee has retired from the bench, and Mr. (now Mr. Justice) Coltman, who is understood to have received a promise of a judgeship from Lord Brougham at the commencement of his chancellorship, has been appointed in his stead.

The following gentlemen have received silk gowns:—Messrs. F. N. Rogers, Biggs Andrews, G. Chilton, Jun., J. Evans, R. B. Crowder, J. Jervis, F. Whitmarsh, and C. P. Cooper. Since the fashion has now become established of conferring this kind of honour with reference to other considerations than extent of practice, we should be glad to know why Mr. Barniewall's name is omitted in the list. We state the general opinion of the common law bar when we say, that the high respectability of his character, and the benefits he has conferred on the profession by his reports, give him a much better claim than most of those who have been included in the recent batches.

The deaths it is our duty to record those of Sir James Burroughs, and Mr. Jekyll. We inserted a memoir of Sir James Burroughs, on his retirement from the bench^a, and we propose shortly to give a memoir of Mr. Jekyll. The promised biographical notice of Mr. Fonblanque is unavoidably postponed.

^a 3 Law. Mag. 299.

LIST OF NEW PUBLICATIONS.

A Practical Treatise on the Law of Charities. By W. R. A. Boyle, Esq. of Lincoln's Inn, Barrister at Law, in royal 8vo. price 1*l.* 4*s.* boards.

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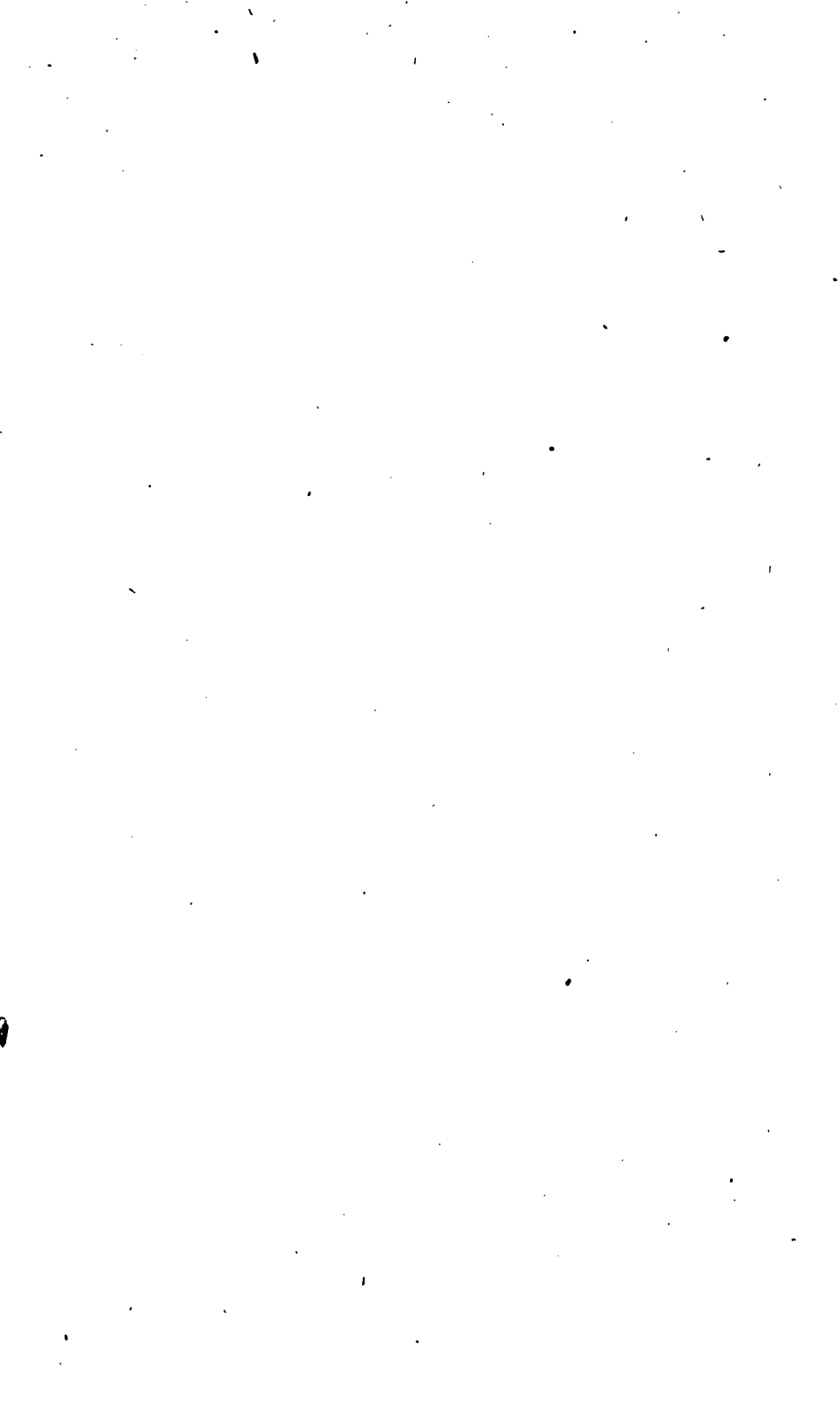
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